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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

By OCTAVIUS PICKERING,

COUNSELLOR AT LAW.

VOLUME VIII.

SECOND EDITION.

WITH NOTES AND REFERENCES

BY J. C. PERKINS

BOSTON:
LITTLE, BROWN, AND COMPANY.
1864.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THIS VOLUME OF REPORTS.

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE,
HON. MARCUS MORTON,
} JUSTICES.

ATTORNEY-GENERAL.
HON. PEREZ MORTON.

SOLICITOR-GENERAL.
HON. DANIEL DAVIS.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF SUFFOLK AND NANTUCKET, MARCH TERM 1829, AT BOSTON

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON,

ELISSE MARTIN *et al. versus* JOSEPH INGERSOLL.

Where I, an indorser of a protested bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest, and notice, promised M, a subsequent indorser, who had taken up the bill, to repay him, and afterwards received the bill from M, proved it in his own name against the estate of the drawees who had failed, and received a dividend upon it, and retained the bill; it was *held*, that I was liable on this promise to repay M, unless he could prove that his promise was made under a mistake of the facts.

During the Christmas holydays vessels are not allowed to clear out at the Havana; it *seems* therefore, that during the continuance of the holydays it is not necessary to write a notice of the dishonor of a bill, to be sent to a foreign port.

THIS was assumpsit against the defendant as indorser of a bill of exchange dated at Charleston, S. C., April 23, 1825, drawn by James Butler Clough upon Crowder, Clough & Co. of Liverpool, payable to John Robinson & Co. or order, in London, for 1163*l.* 19*s.* 6*d.* at 60 days' sight, and indorsed by Robinson & Co. to the defendant, and by him to the plaintiffs, and by them to one Pasqual, and by him to one Mila de

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Martin v. Ingersoll.

la Roca, and by him to Gower, Nephews & Co. of London. The declaration, besides counts for the non-acceptance and non-payment of the bill, contained the usual money counts. The general issue was pleaded and joined.

At the trial, before *Parker* C. J., the evidence on behalf of the plaintiffs proved the following facts.

The plaintiffs had received the bill of the defendant, and when they sold it, placed the proceeds to the defendant's cred-

It The bill was presented for acceptance in Liverpool and protested for non-acceptance August 10, 1825, and on the 26th of that month it was accepted *supra* protest by B. A. Goldschmidt & Co. in London, for the honor of Martin, Knight & Co., the plaintiffs. The bill was duly presented for payment and protested for non-payment October 12, 1825, and was afterwards paid by Goldschmidt & Co., for the honor of the plaintiffs, to the holders, Gower, Nephews & Co. Goldschmidt & Co., under date of August 30, 1825, advised the plaintiffs of the bill's being noted for non-acceptance, and of their having accepted it for the honor of the plaintiffs; and October 3, 1825, remitted the bill and protest for non-payment to the plaintiffs, who received them December 24, 1825. On December 13, 1825, the defendant wrote the following letter to the plaintiffs from Boston: — "I have very recently returned from Europe. While in London on 25 October, I saw there your Michaelis, who informed me of the protested draft of James B. Clough, indorsed John Robinson & Co., on Crowder, Clough & Co., which was sold by you on my account at Havana. I made immediate arrangements with Mr. Bates, and he has long before this taken it up. My last draft on Samuel Williams I likewise provided for, before I left London; all of which, before this reaches, you will no doubt be informed of; therefore you will lose nothing by my negotiations. I shall not lose any thing by Williams; and the indorsers of Clough's bills, John Robinson & Co. of Charleston, I am informed, are yet good. If you have received the protest and are satisfied that I have placed funds in London to meet your

3 demand on this bill, you will please to forward the same to Dodd & Barnard for my account at Charleston (S. C.) in order that they may secure me as speedily as possible." This

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letter the plaintiffs received January 10, 1826, and on January 12, 1826, sent the bill and protest to Dodd & Barnard; and Dodd & Barnard acknowledged the receipt of them January 28, stating that they had made a demand on Robinson & Co., but without effect. The defendant sent two other letters to the plaintiffs, containing the following passages. "Boston, December 24, 1825. I wrote you a few days since. The present is to inform you, that I made such arrangements with your Mr. Michaelis at London, that I have no doubt that you will, before this reaches you, be informed by him, that all my drafts negotiated with you have been taken up or paid for my account. Should this be the case and you have the protest or drafts with the protest sent to you, you will please to have them forwarded to Messrs. Dodd & Barnard, to enable those gentlemen to secure for me the amount against the indorsers, John Robinson & Co., of that place:" — "Boston, 16 February, 1826. Your esteemed favors, 12th and 25th, have come to hand. I have received the bill from Messrs. Dodd & Barnard, and forwarded to Liverpool. The amount was placed in the hands of Mr. Joshua Bates, in London, in November last, and I have no doubt before this reaches you, he will have settled the same with your Mr. Michaelis at London."

Latham & Gair of Liverpool, in February or March, 1826, received the bill from the defendant, and proved the same in his name against the estates of Crowder, Clough & Co., the drawees, who stopped payment on or before the day when the bill was presented at their counting-house, and Latham & Gair received a dividend in his name. This claim was allowed on the ground, that the bill was originally given for value received by Crowder, Clough & Co. At the time of the trial, Latham & Gair still held the bill as belonging to the defendant and subject to his order.

Robinson & Co. failed after Crowder, Clough & Co., and probably as soon as news of that event reached them.

Weekly packets sail from Liverpool to New York, and 4
there are frequently other opportunities of forwarding letters to that place. The opportunities from Liverpool to Havana are irregular, being about once and sometimes twice a month from October to May; and from May to October, much less fre-

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Martin v. Ingersoll.

quent; there sometimes being no means of conveyance for six weeks or two months. The opportunities for sending to Charleston are frequent from October to May, two or three a week; but from May to October much less frequent; there sometimes being none for six weeks. Government packets sail monthly from Falmouth for the West Indies, which carry regular mails. They usually sail on the second Tuesday of each month, though this is sometimes altered; and this is the regular mode of sending notice from London to parties in the West Indies. Their passages are from forty to fifty days. The mode of sending notices from Liverpool to the West Indies is by transient vessels. Passages from Liverpool to Havana are on an average about forty days. The regular mode of sending notices from London to the United States, is by the Liverpool packets.

The counsel for the defendant gave in evidence a protest made at Charleston, January 28, 1826, for the non-payment of the bill by Robinson & Co., in which it is stated that the bill was presented there by the notary at the request of Dodd & Barnard, and that Robinson & Co. refused payment, alleging that the bill had not been protested for non-acceptance, or that they had not been notified of it; and that if the bill had been sent in due time after it was drawn, it would have been accepted and paid by the drawees. To this protest is annexed a letter from Dodd & Barnard to the defendant, informing him of the refusal of Robinson & Co. to pay, and of their reasons; this letter the defendant received February 10, 1826.

Bates, a witness for the defendant, testified that he was a banker in London, residing there in October, 1825, and that at the latter part of that month he introduced Mr. Michaelis, the plaintiffs' agent, to the defendant; that the defendant and Michaelis then had some conversation together about the bill, both having previously conferred with him about it, and it was
5 then agreed between them, that the defendant should take up and pay the bill without damages, "provided he could have it in proper order," the usual expression made use of on such occasions, to imply that nothing had been done or left undone to prejudice the party's right against the prior parties, or to

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prevent his having recourse upon them, and to deny any intention of waiving any right of exemption which might exist; that at this time they had no reason to suspect that there had been any neglect in notifying the parties to the bill; that on the 16th of November he received orders from the defendant to pay the bill, provided he, the defendant, could do it and preserve his recourse against the indorsers; and that, pursuant to these orders, he called on Goldschmidt & Co., but they could not find the bill; and he left word, that if they would send it, he would pay it; but soon afterward fearing that Goldschmidt & Co. were about to fail, he did not apply again, and in the spring the defendant drew for his money.

A witness for the plaintiffs proved that it is the custom of Cuba to observe the Christmas holydays in such manner that very little business is done. The landing of some articles is permitted, but vessels are not allowed to clear out from the 25th of December to the 6th of January. The merchants during the holydays transact all other business.

The jury, under the direction of the court, found a verdict for the plaintiffs, and the defendant moved for a new trial.

Welsh, for the defendant. The defendant was not duly notified of the non-acceptance of this bill, his liability is therefore discharged. *Turner* v. *Leech*, 4 Barn. & Ald. 450. Besides, there is no evidence that even the letter of Goldschmidt & Co. of August 30, to the plaintiffs, although then too late for a notice of non-acceptance, was seasonably sent. *Lenox* v. *Leverett*, 10 Mass. R. 1; Chitty on Bills, 138. The defendant has neither promised to pay this bill, nor waived his right to regular notice. The conversation in London, in which he undertook to take up the bill, was founded on the supposition that every thing had been properly done in order to charge him. The letters which he subsequently wrote to the plaintiffs rested on the same supposition. The defendant did not have a full knowledge of the facts; which is necessary in order to make a waiver of notice binding. *Miller* v. *Hackley*, 5 Johns. R. 375; *Duryee* v. *Dennison*, 5 Johns. R. 248. His sending the bill to Liverpool to be collected of the drawees' estate was a measure of precaution, and ought not to deprive him of his rights. The notice to the defendant in London

March 28th, 1828.

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could not avail the plaintiffs; they should have sent notice to Boston or Charleston. *Colt* v. *Noble*, 5 Mass. R. 167.

Loring, for the plaintiffs, cited Bayley on Bills, 163; *Pierson* v. *Hooker*, 3 Johns. R. 68; *Duryee* v. *Dennison*, 5 Johns. R. 248; *Thornton* v. *Wynn*, 12 Wheat. 183.

March 16th, 1829.

PUTNAM J. delivered the opinion of the Court. The general objection to the payment of this bill by the defendant to the plaintiffs is, that the holders of the bill have not given due notice of its dishonor. At the time when it was presented for acceptance, Gower, Nephews & Co. were the holders, but although the drawees refused to accept, Goldschmidt & Co. accepted *supra* protest for the honor of the plaintiffs, who were indorsers next after the defendant. If Gower, Nephews & Co. were satisfied with the acceptance *supra* protest, the bill, so far as they were concerned, was honored. It then became the duty of Goldschmidt & Co., acceptors for the honor of the plaintiffs, to give notice to them of the dishonor. If when the plaintiffs paid the bill they were under no legal obligations to pay, in consequence of the laches of Goldschmidt & Co., it was a payment in their own wrong, so far as it respected their remedy against the defendant, unless the defendant has waived all objections to his liability on that account.

We will consider whether the defendant has made such a waiver. The bill was accepted by Goldschmidt & Co. *supra* protest for the honor of the plaintiffs, on the 26th of August, 1825. It appears that Goldschmidt & Co. advised the plaintiffs of that fact by letter dated the 30th of August. It was protested for non-payment at maturity, viz. October 12th, and Goldschmidt & Co. paid it and remitted it to the plaintiffs with their letter of advice and protest on the 13th, which were received by the plaintiffs on the 24th of December, 1825. The
7 defendant was in London on the 25th of October, 1825, and he acknowledges that he then had had notice of the protested draft, from the agent of the plaintiffs, who was then in London. The defendant there had the means of ascertaining all the facts which materially affected his liability on the bill. He returned to Boston, and on the 13th of December, 1825, wrote to the plaintiffs that he had made arrangements with Mr. Bates of

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London to take up this draft; — "Therefore you will lose nothing by my negotiations." He desired the plaintiffs to send the bill to Charleston to be collected of Robinson & Co., who were prior indorsers, for the account of the defendant, if the plaintiffs were satisfied that he had placed funds in London to meet the plaintiffs' demand on this bill. By the letter of December 24, 1825, he substantially repeats the same things. About two months after, viz. February 16, 1826, he acknowledges that he had received the bill and forwarded it to Liverpool; repeating that he had placed funds in London to meet this bill; which was after he had received information of the refusal of Robinson & Co. to pay. It further appears, that he afterwards presented the bill against the estates of Crowder, Clough & Co. the drawees, received a dividend, and now holds the bill; which was originally drawn upon Crowder, Clough & Co. for value which they had received. Now under these circumstances, the presumption of law is, that the defendant promised to pay the bill, and made his arrangements accordingly, because he was liable as a prior indorser, and the regular proceedings had been pursued to enforce his liability.

The defendant now contends that there is no evidence to show that the notice of August 30, 1825, of the dishonor of the bill, and of the acceptance *supra* protest by Goldschmidt & Co. for the honor of the plaintiffs, was sent by the then next packet to the West Indies from Liverpool, to be forwarded to the plaintiffs, and so the plaintiffs paid in their own wrong. We are of opinion, that under the circumstances the burden rests upon the defendant to show that fact. This is a matter which might have been rendered certain by the witnesses in the Havana; but from examination of their depositions it does not appear certainly when that letter of the 30th of August (only four days after the acceptance of Goldschmidt and Co. *supra* protest) was forwarded from England or received by the plaintiffs. That was a regular banking-house, and it would have been a very extraordinary neglect if they had not sent by the then next packet the letter which certainly was written in season. It happens that the advice of the non-payment is proved to have been seasonably given and received. The defendant was in London, and had it in his power to as-

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certain the fact if there had been laches on the part of Goldschmidt & Co. He was satisfied and continued to be so, long after his return to the United States, and after the knowledge of the failure of his prior indorsers. He has treated the bill as his own; he has claimed under the English commission, in his own name; and he cannot put the plaintiffs *in statu quo*. We think, under this evidence, it is for the defendant to disprove the presumption which the law raises from it, that the regular notice was forwarded by Goldschmidt & Co. The acceptor for the honor of the indorser was under no obligation to notify any other party than the one to whom he intended to resort. The conduct of the defendant amounts to an admission that he was satisfied that the proper notice had been given, and he should show clearly that he has acted upon a mistake. In the absence of any such evidence, we think the defendant would be liable according to his repeated assurances to the plaintiffs.[1]

An objection was raised, that the plaintiffs did not seasonably notify the house of Robinson & Co. at Charleston; but we are satisfied that no laches were proved on that account. The plaintiffs proceeded according to the usages at Havana, and were not responsible for the delays arising from the Christmas holydays. In two days after they received the letters which the defendant wrote to them from Boston, they sent notice to Charleston according to his directions. It was argued that they should have sent notice to him at Boston, of the dishonor of the bill; and that the notice which their agent in London gave to him in that city was not sufficient. He had notice in fact as soon as the plaintiffs had. At any rate, after he returned to Boston and before he wrote his letters from
9 thence to the plaintiffs engaging that they should not lose any thing by his negotiations, he had the means of knowing all the facts; and if there had been any irregularity in regard to notice, which certainly is not to be presumed from the evidence before us, it was for the defendant to prove that he acted upon

[1] See Bayley on Bills, (2d Am. ed.) 299, 300; *Grosvenor* v. *Stone*, *post*, 79; *Konig* v. *Bayard*, 1 Peters's Sup. Ct. R. 262; *Jones* v. *Savage* 6 Wend. 658; *Lawrence* v. *Ralston*, 3 Bibb, 102; *Offit* v. *Vick*, Walker, 99

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a misapprehension of the facts. As the evidence is presented to us, we are all of opinion that the plaintiffs are entitled to recover. The defendant must be defaulted.

ROBERT G. SHAW *versus* DAVID NUDD.

A written authority is not necessary in order to enable an agent to sign, for his principal, a contract required by the statute of frauds to be in writing.

W, as agent for S, agreed with N, at Newburyport, to purchase of him a quantity of fish then at Newburyport, and N told W to go to C the next day and get him to sign the contract for N, if he was not in town himself. W accordingly wrote a contract stating a sale of the fish by N to S for "12*s*. 8*d*. per quintal and nine cents per quintal for delivering them in Boston, the wharfage to be paid by S, all other incidental charges to be paid by N, cash to be paid in Boston, the fish to be at S's risk when on board the vessel at Newburyport." C signed this contract for N and received from W a counterpart signed by W in behalf of S. C had no authority to act for N except that communicated by W. C delivered the counterpart to N the same day, who received it without objection, and did not object to it for several days. N having refused to deliver the fish, S brought an action on the written contract to recover damages for the non-delivery. *Held*;—

That N was bound by the contract, even if C had no authority to sign it, having adopted it:—

That by the contract the fish were to be delivered in Boston, and would not become the property of S until delivered there:—

That therefore the damages recoverable must depend on the value of the fish at Boston at the time when they ought to have been delivered.

THIS was an action for the breach of the contract set forth below.

The case was submitted to the Court on the following statement of facts agreed by the parties.

The defendant, on December 6, 1826, agreed with T. Winsor, the plaintiff's agent, to sell the plaintiff 627 quintals of fish, then on the flakes of one Pettengill as agent of Philip Coombs, situated near Newburyport. No earnest money was paid, nor written contract signed at this time. The bargain was made at Newburyport, where neither of the parties resided; and Nudd told Winsor to go to Coombs the next day, if he, Nudd, should not be in Newburyport, and get Coombs to sign the contract in his behalf. Accordingly Winsor went the next day to Coombs, and asked him to sign the contract as agent for Nudd. Coombs at first declined signing, but finally yielded, not doubting that the contract was truly stated, from

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what he had heard respecting the business, and signed the following contract written by Winsor, dated Newburyport, December 7, 1826. — "Sold R. G. Shaw Esq. my fare of Labrador fish (slimy and broken excepted) through the agency of Thomas Winsor, for 12*s*. 3*d*. per quintal and nine cents per quintal for delivering them in Boston, the fish to be properly dried for shipping, the wharfage to be paid by said Shaw, all other incidental charges to be paid by said Nudd, cash to be paid in Boston, the fish at said Shaw's risk when on board the vessel at Newburyport. Philip Coombs for David Nudd. Capt. John T. Ross is to decide as to the order of the fish."

A counterpart of this contract was signed by Winsor on behalf of Shaw, and left with Coombs.

Coombs had no authority to act as Nudd's agent or attorney in respect to any of his business, nor had he any special authority in this instance except what he derived from Winsor's communication. Winsor was himself interested in the profits of this transaction.

Nudd came to Newburyport the same day, and Coombs handed him the contract, which he read and put in his pocket. Coombs told him that if the paper did not conform to the agreement, he must withdraw it, but Nudd at this time made no objection to it. But a few days afterwards Coombs understood Nudd to say, that he would not deliver the fish unless he received the same that one Joseph P. Russell received, which was 12*s*. 6*d*. John T. Ross, acting under a written authority from Winsor to attend to the weight and delivery of the fish, and to send them round to Boston, called on Nudd on December 16, and as Shaw's agent demanded the fish; but Nudd refused to deliver them, saying that he would not let Ross have them until he knew what Russell got for his; and on the 21st
11 he again refused to deliver them, unless he could get the same price that Lovell Brown got for a lot sold in Boston some days after the bargain was made.

Afterwards, in conversation with Coombs, who said that the breach of contract would injure him (Coombs), Nudd said that it could not, for no earnest money had been paid.

Before this time Nudd had stated to Ross, in answer to a

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previous inquiry, that he was to carry the fish to Boston in his own vessel.

On December 6th, the day when the bargain was made, and before the written contract was signed, Nudd told one Merrill that he had sold his fish to Winsor for 12*s*. 3*d*. cash on delivery of them in Boston, and that he was to have nine cents for delivery of them there. On the same day Nudd stated to Russell, that he, Nudd, was to have 12*s*. 3*d*. and more, if more was given to any one else. Nudd sold the fish, about the 17th of March, 1827, for 17*s*. 3*d*. cash.

Judgment was to be given for the plaintiff, if the Court should consider Nudd legally bound by the contract declared on, otherwise for the defendant. If judgment was given for the plaintiff, the damages were to be at the rate of 13*s*. 6*d*. per quintal, if the Court should be of opinion that Newburyport was the place of delivery fixed by the contract, but at 16*s*. if Boston was the place of delivery, or at 17*s*. 6*d*. if the Court should think Nudd liable for the price he received for the fish. The defendant in the two last cases claims to deduct 9 cents per quintal, the price in the contract for transporting the fish to Boston.

March 31*st* 1828.

Loring, for the plaintiff, admitted that it was necessary for the contract to be reduced to writing, in order to be binding on Nudd; but he contended that Coombs was the agent of Nudd for signing the contract. It is well settled that a verbal authority to sign a written contract is sufficient. *Merritt* v. *Clason*, 12 Johns. R. 102; *Clinan* v. *Cooke*, 1 Sch. & Lefr 22. Even if Coombs had not sufficient authority, yet Nudd, by afterwards receiving the writing without objection, ratified the act of Coombs as his agent. *Smith* v. *Cologan*, 2 T. R. 188, note.

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The delivery of the fish was to be in Boston. The damages therefore must depend upon the price in that place; and the plaintiff is entitled to the highest price at any time between the time of the neglect to deliver and the time of trial. *Shepherd* v. *Johnson*, 2 East, 211; *West* v. *Beach*, 3 Cowen, 82. It is true that *Gray* v. *Portland Bank*, 3 Mass. R. 364, gives a differen rule for damages, as well as *Bush* v. *Canfield*,

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2 Connect. R. 485; *Gainsford* v. *Carroll*, 4 Dowl. & Ryl. 161; *Brackett* v. *M'Nair*, 14 Johns. R. 170.

Cushing, for the defendant. It is not disputed that a parol authority to sign a written contract is valid. *Needham* v. *Gorham*, 6 Dane's Abr. 124; *Anonymous*, 12 Mod. 564; *Coles* v. *Trecothick*, 9 Ves. 251. But Winsor, being a party interested, could communicate no authority to Coombs. The contract was never ratified by Nudd, but on the contrary was repudiated by him within a reasonable time.

The place of delivery was at Newburyport, for the fish were to be at Shaw's risk when put on board there. The damages therefore must depend on the price at Newburyport. *Mercer* v. *Jones*, 3 Campb. 477; *Greening* v *Wilkinson*, 1 Carr. & Payne, 626; *Leigh* v. *Patterson*, 8 Taunt. 541; *S. C.* 2 Moore, 588; *Gainsford* v. *Carroll*, 2 Barn. & Cressw. 624; *Shepherd* v. *Hampton*, 3 Wheaton, 200; *Kennedy* v. *Whitwell*, 4 Pick. 466.

March 16*th*, 1829.

PARKER C. J. delivered the opinion of the Court. We have no doubt the contract on which the action is brought, is the defendant's contract. He, by the intervention of Winsor, who was the plaintiff's agent, authorized Coombs to enter into the contract for him, and he received from Coombs a counterpart of the contract signed by Winsor for Shaw, without objecting to it; and it appears abundantly by his conversation with divers witnesses, that the contract was made for him.

There was no necessity that the authority of Coombs should be in writing,[1] nor can it be objected that Winsor, who communicated the authority from Nudd to Coombs, was interested in the speculation. The adoption of the contract by Nudd would be quite sufficient, even if there were no antecedent authority. *Merritt* v. *Clason*, 12 Johns. R. 103.[2]

13 There being then a contract, the questions are, what is the purport and meaning of it; has it been broken; what are the damages.

The plaintiff contends that the writing is one entire contract for the sale and delivery of the fish in Boston; the defendant,

[1] See Story's Comm. on Agency, 51, 52.

[2] See *First Parish in Sutton* v. *Cole*, 3 Pick. 232; *Emerson* v. *Newbury*, 13 Pick. 279; Story's Comm. on Agency, 234, *et seq*

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that it is a sale at Newburyport, and an independent contract to carry the fish to Boston. And the damages will be greater or less, according to the adoption of one or the other of these constructions. If the sale was completed at Newburyport, then the price of the fish there when they were demanded, is the rule of damages; if it was an executory contract to sell and deliver in Boston, then the price at Boston.

We think the latter is the true construction; that it is an entire contract; that the fish did not become Shaw's on the execution of the writing; there was no delivery; they were liable to attachment as Nudd's; and Shaw could not maintain trover against a second *bonâ fide* purchaser. The fish were agreed to be sold, not sold; that is, the property in them was not transferred.

The contract appears to us to be, to sell and deliver the fish at Boston. Twelve shillings and three pence were the price per quintal, but nine cents were to be added for the expense of transportation. Shaw was to pay wharfage, and the fish were to be at his risk when on board. Why was this, if the sale was absolute at Newburyport? Nudd is to pay other incidental charges, that is, for shifting the fish from the flakes to the wharf, culling, &c. It is evident that the property in the fish was to remain in Nudd, and that he could have retained them in Boston until the price was paid. The assumption of risk by Shaw, was an agreement to insure. There were not two contracts, but one. The defendant stipulated to carry his fish to Boston and deliver them to Shaw on payment of the price, with the additional sum for transportation.

What then will indemnify the plaintiff for the breach of this contract? Only the value of the fish at the place where they ought to have been delivered. Shall the defendant voluntarily and wantonly break his contract and gain by it? We think not. The purchaser is entitled to the thing sold, or its value. As to bringing down the damages to the time of trial, that 14
would be so fluctuating and uncertain, it cannot be a good rule. The wrong is done when the contract is broken, and the value of the thing when and where it ought to be delivered, is the indemnity. *Gainsford* v. *Carroll*, 2 Barn. & Cressw. 624; *Shepherd* v. *Hampton*, 3 Wheaton, 200; *Kennedy* v. *Whit-*

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well, 4 Pick. 467 ; [2d edit. 467, note 1;] *Cooper* v. *Chitty*, 1 Burr. 31 ; 3 Dane's Abr. 194 ; *Mercer* v. *Jones*, 3 Campo. 477.[1]

Judgment for the plaintiff.

JOHN S. ELLERY *versus* THE NEW ENGLAND INSURANCE COMPANY.

Insurance was made on a ship "at and from Boston to all ports and places on the globe, and until her return to Boston, not exceeding two years." She sailed from the coast of Brazil for Boston, and on arriving in Boston bay, below the harbour, was ordered by the owner to put into Salem, the two years not having yet expired. She accordingly put into that port, for the purpose of being repaired. *Held*, that the risk did not terminate on her arrival at Salem.

The destination of the vessel to Boston did not, in such case, limit the risk insured, thereafter, to that voyage, but the owner might, at any time before her arrival at Boston, alter her destination, and the risk would still continue.

Putting into Salem in such case was not a deviation.

Under such a policy, visiting the same port more than once is not a deviation.

A damage done to a ship by the violence of the wind during an attempt to haul her upon a marine railway to be repaired, and while she is partly on land, is covered by a policy of insurance against loss by the perils of the seas and "all other losses to which assurers are liable," this being a loss *ejusdem generis* with those specified.

Where a new and a safe mode of repairing ships has come into use since the making of insurance on a ship, the assured may avail himself of it without prejudice to the policy.

Thus a ship was insured for two years, by a policy made at Boston, where there was no marine railway, and before the expiration of the time she put into a neighbouring port to be repaired upon such a railway, this mode of repairing having there got into pretty general use since the making of the policy, and while she was hauling up the railway she was blown over and bilged ; and it was *held*, that this was a loss within the general words of the policy, "all other losses and misfortunes to which assurers are liable by the rules and customs of insurance in Boston."

THIS was *assumpsit* on a policy of insurance for 4000 dollars on the ship Panther "at and from Boston to all ports and

[1] See *Parks* v. *Boston*, 15 Pick. 206 ; *Pearson* v. *Purkett*, 15 Pick. 264 ; *Stone* v. *Codman*, 15 Pick. 300 ; *Sargent* v. *Franklin Ins. Co.* 8 Pick. 100 ; Chitty on Contr. (4th Am. ed.) 683, in notes, and 352, 353, and notes ; *Wells* v. *Abernethy*, 5 Connect. R. 222 ; *Gleason* v. *Pinney*, 5 Cowen, 152 ; *Nelson* v. *Ford*, 5 Hammond, 474 ; *Stevens* v. *Lyford*, 7 New Hampsh. R. 360 ; *Dey* v. *Dox*, 9 Wendell, 129 ; *Shepherd* v. *Hampton*, 3 Wheaton, 200, 204 ; *Clark* v. *Pinney*, 7 Cowen, 687 ; *Connell* v. *M'Clean*, 6 Har. & Johns. 297 ; *Willings* v. *Consequa*, 1 Peters's Cir. Ct. R. 172, 176 ; *Williamson* v. *Dillon*, 1 Har. & Gill, 444

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places on the globe and until her return to Boston, not exceeding two years from this date, September 11, 1824, at noon. The assured has liberty to cancel this policy at any time, by paying the amount of premium due *pro rata*, the same not to be less than two and a half per cent." The premium was at the rate of five per cent *per annum*.

During the period of the risk, the ship sailed from the coast of Brazil bound for Boston, for the purpose, as stated by the mate, of being there repaired and coppered. She arrived in Boston bay on the 10th of May, 1826, and fired a gun for a pilot, and was boarded by one about midnight, by whom the owner sent orders to the master to go into Salem for repairs. She accordingly put into Salem, where preparations were made for hauling her upon the marine railway to make the repairs. As she was hauling up, and while she was yet partly water-borne, her bow being supported on the cradle of the railway, either owing to the wind, which was violent and blew in gusts at the time, or to some defect in fitting the blocks to her bottom, for the purpose of supporting her on the railway, or to both of these causes, she heeled and fell partly over on her side, some of the blocks breaking quite through her side, so that the water was admitted and ebbed and flowed in her hold, and she was so injured, either at the time, or then and afterward by lying in that position, that she was not worth repairing. This action was brought to recover for the damage occasioned by this accident.

Questions arose in the course of the trial, as to the correctness of the representations of the master, respecting the shape and model of the ship, to the superintendent of the railway, and whether his description of her as "very flat amidships and cut up at each end," did not mislead the superintendent as to blocking and securing her on the railway; but the testimony appeared to support and justify this representation of her captain. Testimony was also introduced, as to the expediency and safety of attempting to haul her out in the state of the wind at the time; in regard to which the opinions of the witnesses differed.

Neither at the time of effecting the policy, nor when the Panther returned to the United States, was there any marine

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railway in use in Boston for the purpose of repairing vessels, and the Salem railway had been in use but a short time, having been completed in 1824. Only three vessels had been hauled up and repaired upon it during that year. The following year it was very much used, from 140 to 150 vessels having been repaired upon it during the year, some of which were sent from Boston for this purpose. A number of witnesses stated that this way of repairing was preferable to heaving out the vessels, which had been previously in use in Boston and Salem.

It did not appear from the testimony, what was the intended destination of the ship, after the repairs should be made; whether it was intended that she should proceed to Boston to discharge her cargo there, or go to some other port. The crew, excepting two officers and four men, were discharged on her arrival at Salem.

After the enumeration of particular risks, the policy provided that the underwriters should be liable for "all other losses and misfortunes to which assurers are liable by the rules and customs of assurance in Boston." Mr. Balch, president of an assurance office in Boston, said he did not recollect a loss on a vessel insured as this was, and under precisely similar circumstances; but under policies on time, he had paid losses happening on vessels while they were repairing in the dry docks at Liverpool.

During the absence of the Panther, she had twice visited the same port in South America.

The declaration contained four counts; 1. for a loss by the ship's being blown over on the marine railway; 2. for a loss by the perils of the seas; 3. for money paid, laid out and expended; and 4. for money had and received.

The jury found a verdict for the plaintiff for a total loss. They also found that the loss was not attributable to any carelessness or misconduct of the master, or of the superintendent of the railway.

June 17th, 1828.

Webster, *Saltonstall* and *Mason*, for the defendants, contended that the policy was one for a voyage, and not merely on time. The latter expires by the mere efflux of time. In this, the risk is to end in Boston, if the ship returns within two

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years. It is a policy on a voyage terminating at Boston. *Stocker* v. *Harris*, 3 Mass. R. 409; *Cleveland* v. *Union Ins. Co.* 8 Mass. R. 308. The insured has liberty to go from port to port, but this liberty is limited to two years, or the arrival of the ship in Boston before the expiration of that time. Policies of this kind are mentioned in the books. Valin's Com. *lib.* 3, *tit.* 6, *art.* 35; 3 Pardessieux on Commercial Law, 270. When the election was made to return to Boston, the risk became the same as if that voyage had been inserted in the policy; and accordingly, going to Salem was a deviation, as it was not for any purpose connected with that voyage. It was also a deviation for the ship to visit the same port twice under this policy, as the Panther was proved to have done in South America. In *Mellish* v. *Andrews*, 16 East, 312, liberty was given to touch at all places in the East Indies, and touching a second time at the same place was held to be a deviation. In *Thorndike* v. *Bordman*, 4 Pick. 471, the Court restrict the liberty of touching to the purposes of the voyage.

The policy is against perils of the sea; this was a loss on land, and so not within the policy. The bows of the ship were fast, the stern only being water-borne, when the loss took place. If she had remained afloat, she would not have been damaged, as no other vessel in Salem was injured at that time *Thompson* v. *Whitmore*, 3 Taunt. 227; *Fletcher* v. *Inglis*, 2 Barn. & Ald. 315. The circumstance that the ship was taken out of the water by mechanical means, makes this case still stronger.

The rules and customs of Boston are referred to in the policy, but this mode of repairing was a new invention, and so not within the contemplation of the parties at the time of making the policy.

The verdict is against evidence as to the negligence of the master, or the superintendent of the railway, and so the underwriters are not liable. Phil. on Ins. 224, *et seq.* [*Parker* C. J. There is no question that the insurers are not answerable for a loss that manifestly arises directly and wholly from the negligence of the assured or his agents; the only doubts are, as to the fact and the degree of negligence by which the

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insurers shall be exonerated.] In *Carruthers* v. *Sydebotham*, 4 Maule & Selw. 77, the whole question related to the privity between the owners of the vessel and the pilot, through whose negligence or want of skill the accident happened, and the court considered the pilot not to be the agent of the insured. The present case is distinguished from that, for here the master was himself a part-owner, and both he and the superintendent of the railway were agents of the owners. The underwriters may not be answerable for losses by the negligence and unskilfulness of those whom the owner is obliged to employ.* He must, for instance, take such a pilot as the government supplies. But where he is at liberty to choose, as in appointing a master or employing persons to make repairs, he is answerable for their skill and conduct. As to the novelty of this mode of repairing, it is not contended that the assured may not adopt a new mode, provided it is previously proved to be a safe one; but he must not make experiments at the risk of the underwriters.

S. Hubbard and *C. G. Loring*, for the plaintiff, said this could not be an insurance on any particular voyage, as none was marked out by the policy, nor was any object or enterprise expressed. If this was an insurance for two years, unless the assured chose to terminate it sooner (and so it is very distinctly expressed to be in the policy), the going into Salem was connected with the risk insured; for the vessel needed repairs, as was very fully proved, and the assured had not only a right, but was bound, to make repairs. The case of *Pelly* v. *Roy. Exch. Ass. Co.* 1 Burr. 341, is in favor of the plaintiff, and that of *Phillips* v. *Barber*, 5 Barn. & Ald. 161, is exactly in point.

The loss is to be ascribed to the proximate cause; *Smith* v. *Scott*, 4 Taunt. 126; *Busk* v. *Roy. Exch. Ass. Co.* 2 Barn. & Ald. 73; which in this case was the violence of the wind The insured must employ men to navigate and repair his vessel, and if he employs the best he can, he is not answerable for losses occasioned by the perils insured against, though remotely contributed to by their want of care *Bussy* v. *Don*

* See *Yates* v. *Brown*, *post*, 23

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aldson, 4 Dallas, 206; *Carruthers* v. *Sydebotham*, 4 Maule & Selw. 77. See also *Hodgson* v. *Malcolm*, 5 Bos. & Pul. 336; *Law* v. *Goddard*, 12 Mass. R. 112. Extreme care is not necessary, and there is no proof in this case of extreme carelessness. We are entitled to a remedy, either against the insurers or the owners of the railway, and the verdict negatives any claim against the latter.

This is a policy on time, and the insured had a right to go to any port whatever during that time. Though the master had elected to return to Boston, the owner had a right to control this determination. The master may change his port of discharge. *Coolidge* v. *Gray*, 8 Mass. R. 527. In the case of *King* v. *Middletown Ins. Co.* 1 Connect. R. 134, the owner chose the port of discharge, after the arrival of the vessel in the United States.

It is said that the clause making the underwriters liable for "all other losses," is not to be interpreted with the same latitude here as in England, according to *Butler* v. *Wildman*, 3 Barn. & Ald. 398, because a reference is had in our policies to the rules and customs of insurance in Boston. But there is no special rule or custom in Boston, in regard to the subject in question; and the case of *Butler* v. *Wildman* was published here before this policy was made.

March 16th 1829.

PUTNAM J. delivered the opinion of the Court. It is contended for the defendants, that they are discharged on the ground of deviation.

The argument is, that having elected at Bahia to go to Boston and actually proceeding upon that voyage, the plaintiff had no right to go to Salem.

We think that this construction would be too narrow. It would take away the liberty which was granted by the policy, to go to "*all ports and places on the globe*," within the term specified. The limitation would extend as well to the outward, or any intermediate voyage, as to the returning voyage, and would deprive the plaintiff of the commercial or other advantages which might occur, and from profiting by the advices which he might receive on the passages or elsewhere. Now it seems to us, that the parties have used the broad phraseology in the policy with the manifest intent to exclude the con-

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struction for which the defendants contend. This policy was for time. The plaintiff was by implication of law required to have the ship properly manned and furnished, and employed in some lawful business; but it was left to his discretion to send her to such ports and places as he should think proper. When she was ordered to Salem, there were three or four months of the term unexpired. The repairs which were required, were from ordinary wear and tear. But it was lawful for the assured to make them, without prejudice to the policy, as it would have been if they had arisen from any perils for which the underwriters were liable. We are satisfied that the plaintiff had a right to order the ship to Salem for that purpose, instead of terminating the policy at Boston by returning to that port.[1]

It does not appear, whether the assured intended to send the ship to Boston or elsewhere, after she had been repaired. Nor is it material that it should. That was the concern of the assured, touching which the underwriters had no right to be informed. It was for the plaintiff to determine whether he would put an end to the policy within the two years or not. After the ship had been repaired, she might have been employed in any lawful voyage or business. In short, there could be no deviation in regard to the port or place to which she might be ordered, for any lawful purpose, within the two years.

It is further contended, that the loss was upon the land, and in the course of a dangerous process of repair, not practised in this country when the policy was made, and for no use connected with the voyage, nor to enable the ship to complete it within the time.

It is proved that the ship was in need of repairs, to enable her to make another voyage; which might be undertaken, if not accomplished, within the time. These repairs could be more expeditiously and safely made upon a marine railway, than by heaving the ship out. The evidence upon this fact is clear. The new mode has almost entirely superseded the old one. The ship being within the protection of the policy when repairing, "the means must be taken to be insured as well as the end." *Per* Lord *Mansfield*, in *Pelly* v. *Royal Exch. Ass. Co.* 1 Burr. 348. The tackle and furniture in the case

[1] 2 Phillips on Ins. 158, 159, 174.

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cited, were burnt upon the land, in a store where they were properly placed while the ship was having repairs made; and they were held to be at the risk of the underwriters. So it would unquestionably be, if the ship should be, for good reason, put into a dry dock to be repaired, and be burnt. She would be as much at the risk of the underwriters as if she had been burnt upon the high seas.

The case cited, of *Thompson* v. *Whitmore*, 3 Taunt. 227, proves that if a ship, hove down on the beach to be repaired, should be thereby bilged and damaged, it is not a loss by *the perils of the seas, as the damage happened upon the land* The averment in the declaration was for a loss by the perils of the seas, and the plaintiff was nonsuited. That case was cited in *Phillips* v. *Barber*, 5 Barn. & Ald. 161, which in many particulars is like the case at bar. The policy was for time, "at sea and in port," and the ship was blown over when in the graving-dock for repairs, and bilged. The opinion of the King's Bench was given by *Abbott* C. J., who stated, that "the loss was occasioned by the violence of the wind and weather in port; and it seemed to him, therefore, to have been produced by a peril *ejusdem generis* with those specified, and to fall within the general words of the policy." In the case at bar, the particular circumstances of the loss are stated with sufficient certainty in the first count. The loss comes within the general description of "all other losses" *ejusdem generis* with those which are named in the policy. It falls within the scope of the policy. See *Butler* v. *Wildman*, 3 Barn. & Ald. 398, *S. P.*[1]

The suggestion, that the parties did not contemplate the repairing of the ship upon a railway, we think would have had great weight, if this had been the first experiment; but the railway had been tested again and again. It was in common use when the ship was placed upon it. Any prudent shipowner or master would be justified, if not required, to use it. The defendants would have had much more reason to complain of a claim for a loss which might have happened from heaving out or heeling the ship, as formerly practised, when

[1] 2 Phillips on Ins. 191, 194

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she might have been placed upon a railway to be coppered The parties may reasonably be supposed to contemplate, that the most approved means shall be employed in repairing, as well as in the management of the ship.[2]

22 It is further contended for the defendants, that the verdict is against the evidence, upon the point of negligence of the master of the ship, and of the superintendent of the railway. The jury have found, that the loss was not occasioned by the carelessness or misconduct of either of them.

If it had arisen from the negligence of the master, it would have been a good defence. But upon examining the testimony very carefully, we do not perceive how that allegation could be supported against him. He was bound to make a proper representation of his ship to the superintendent of the railway, and from the testimony of the superintendent himself it would seem that a correct representation was made ; although the superintendent might not have fully comprehended it. The master said, that "the ship was very flat amidships and cut up at each end ;" and so she was. He surrendered the ship to the direction of the superintendent, to have her properly placed upon the railway, and he did, and caused to be done, all things which the superintendent required.

Then it is argued, that there was negligence on the part of the superintendent, in not fashioning the blocks to the form of the bottom of the ship, and that the loss was occasioned thereby. If that were proved, it would not follow that the underwriters should be discharged. The consequences of the negligence of the superintendent should not be visited upon the assured or the master, any more than the negligence of a pilot would be attributed to them. *Carruthers* v. *Sydebotham*, 4 Maule & Selw. 77. In that case the ship was lost by the misconduct of the pilot, but the underwriters were held to be answerable.

There is evidence upon both sides concerning the alleged negligence of the superintendent. Some witnesses think the ship was destroyed because she was not properly blocked, and others, that she would have gone upon the railway in safety if

[2] 2 Phillips on Ins. 176.

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the wind had not blown so hard. One witness stated, that at "the critical time" when she touched forward and was water-borne aft, "the squall struck her," and blew her over. It was a question fairly submitted to the jury, and we do not think the Court would be justified in disturbing their verdict, upon that point, whichever way it might have been given. Ellery v. New Eng. Ins Co.

Upon the view of the whole matter, we are all clearly of opinion that the plaintiff should recover for a total loss. 23

Judgment according to verdict.

JOHN YATES *et al. versus* CHARLES BROWN *et al.*

A pilot, while he has charge of a vessel, is the agent of the owner.

The owner of a vessel which, through the fault or negligence of any one on board, injures another vessel by running foul of her, is liable to the injured party, although there be a pilot on board who has the entire control and management of the vessel.

CASE by the plaintiffs, as owners of the brig Only Son, for an injury done to that vessel by the schooner Napoleon, of which the defendants were owners.

It appeared on the trial, before *Parker* C. J., that the Napoleon, when sailing out of the harbour of Boston, bound on a foreign voyage, with a pilot on board, came in contact with the Only Son, which was lying in the stream, and the bowsprit of the Only Son was injured, and some other damage done. One of the defendants was on board the Napoleon when the accident happened. A verdict having been found for the plaintiffs, which settled the amount of damage, and the fact of the mismanagement of the defendants' vessel, a question was reserved for the whole Court, whether, there being a person duly authorized to pilot the Napoleon, the owners of the vessel were liable for an injury arising from negligence or mismanagement in navigating the vessel out of the harbour.

Judgment was to be entered on the verdict, or the plaintiffs to become nonsuit, according to the opinion of the Court.

S. D. Parker, for the defendants, contended that the pilot was not the agent of the defendants, and consequently that the vessel, at the time the accident happened, having been under *June 23d, 1828.*

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his charge, they were not liable for any loss arising from his negligence. He cited *St.* 1796, *c.* 85, § 2, 6, 8, and 10; *St.* 1783, *c.* 13, § 8; *Stocks* v. *Clement*, 1 Peake's Cases, 107; *Snell* v. *Rich*, 1 Johns. R. 305; *Carruthers* v. *Sydebotham*, 4 Maule & Selw. 85; *Nicholson* v. *Mounsey*, 15 East, 384;

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Attorney-General v. *Case*, 3 Price, 302; 1 Holt on Ship. 481. [See *Stephenson* v. *Dixon*, 1 Danson & Lloyd, 332.]

Simmons and *Gay*, for the plaintiffs, cited Laws of Oleron, *Art.* 23; *Brit. St.* 52 Geo. 3, *c.* 39, § 30; *Bennet* v. *Moita*, 7 Taunton, 258; *Ritchie* v. *Borrsfield*, 7 Taunt. 309; *Boucher* v. *Noidstrom*, 1 Taunt. 568; *Carruthers* v. *Sydebotham*, 4 Maule & Selw. 77; *Attorney-General* v. *Case*, 3 Price, 302; *Fletcher* v. *Braddick*, 5 Bos. & Pul. 182; *The Thames*, 5 Rob. Adm. R. 345; Abbott on Ship. by Story, 183, note; *St.* 1783, *c.* 13, § 10; *Bussy* v. *Donaldson*, 4 Dallas, 206.

March 16*th*, 1829

PARKER C. J. delivered the opinion of the Court. We think that the owners of a vessel, which, by collision with another vessel, has caused damage through the fault or negligence of any one on board, is answerable to the injured party, in respect of their property, notwithstanding there may be a pilot on board, who has the entire control and management of the vessel. It is more convenient that such owner should seek his remedy against the pilot, whom he has selected for this service, than that the injured party should; and it is more conformable to the general spirit of the law; for although the pilot holds his commission under the executive authority of the Commonwealth, yet in many respects he is the servant of the owner who employs him, and in regard to the time of sailing is undoubtedly under the direction of the owner. The master, in such case, would not be liable, for he is answerable only in respect of his authority over the vessel, which authority is entirely superseded by that of the pilot, when the vessel is under sail within pilot ground; and so it is decided in *Snell* v. *Rich*, 1 Johns. R. 305, in which case the court avoid giving any opinion in regard to the liability of the owners when a pilot is on board. In a note to the American edition of Abbott on Shipping, it is laid down in general terms, that the owner is liable, although there be a pilot on board who is appointed by

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public authority ; and this position is supported by the case of *Russy* v. *Donaldson*, 4 Dallas, 206, and the principle is fully recognised in the case of *Fletcher* v. *Braddick*, 5 Bos. & Pul. 182. The pilot is indeed put in the place of the master, and there is as much reason for the owner's liability in one case as in the other.[1]

Judgment according to verdict.

HENRY CHAPMAN *versus* WILLARD PHILLIPS. 25

An original writ was indorsed by the plantiff's attorney thus, "A. B. by his attorney, C. D." *Held*, that C. D. was liable as indorser of the writ.

In order to entitle a trustee, under *St.* 1794, *c.* 65, § 4, to costs, it is not necessary that the answer made by him at the first term should be sworn to in court.

Where a person summoned as trustee is discharged and recovers judgment for costs against the plantiff, the indorser of the writ is not liable for such costs, his liability only extending to costs recovered by the defendant.

THIS was *scire facias* against the defendant as indorser of a writ, and was submitted to the Court on the following statement of facts.

The defendant indorsed the original writ, which was in favor of John Andrews against Robert C. Ludlow as principal, and Henry Chapman and others as trustees, in the following manner, viz. "John Andrews, by his attorney, Willard Phillips." The present plaintiff, who was summoned as trustee, was subsequently discharged, and he recovered judgment for costs in this court ; on which an execution issued against Andrews, who was committed to jail thereon, and is wholly insolvent. Judgment was rendered in favor of Andrews against the defendant, Ludlow, in the original suit.

In that original suit, Chapman, who resided in the same county in which the action was brought, appeared at the first term by attorney, and had his answer filed ; but he did not swear to it in court, but swore to it before a justice of the peace.

The question submitted to the Court was, whether Phillips

[1] See Revised Stat. *c.* 32, § 11 ; Abbott on Ship. (edit. 1829,) 160, 161, and note.

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Chapman v. Phillips.

June 24th, 1828.

was liable to pay the costs recovered by Chapman in the original suit; and the defendant was to be defaulted, or the plaintiff to become nonsuit, according to the opinion of the Court.

Sewall, for the defendant. 1. The indorsement in this case was the indorsement of Andrews, not of Phillips. The signing by Phillips no more binds him personally, than the same words would if signed to a bond, note, or other contract. The statute of 1784, *c.* 28, § 11, making the indorser liable to costs, did not mean to change the legal effect of the words indorsed, and to make that the signature of Willard Phillips, which without it was the signature of John Andrews. Had
26 the words been "Willard Phillips, plaintiff's attorney," we should admit that Phillips was personally bound, and that the words after his name were merely a *descriptio personæ*.

2. Chapman not having sworn to his answer at the first term, as is required by *St.* 1795, *c.* 65, § 4, was not entitled to recover costs of Andrews; and the defendant, who was no party to that action and could not make the objection, is entitled in this *scire facias* to show that the original judgment for costs was erroneous. *Dawes* v. *Shed*, 15 Mass. R. 6; *Mason's Devisees* v. *Peter's Admrs.* 1 Munf. 437.

3. The indorser of a writ is only liable to pay the costs recovered by the *defendant*, not those recovered by a *trustee*. The statute of 1784, *c.* 28, § 11, creating this liability, makes provision only for the *defendant*. The *trustee* is not a *defendant*. His relation to the suit is entirely different from that of a defendant, for he does not contest the plaintiff's right of action; and it is usually of no consequence to him which way the suit goes. The trustee is never called a *defendant* in the statutes or the reports. In places where the foreign attachment prevails, he is called the *garnishee*, never the *defendant*. Ashley on Attachments, 5, 6. The statute only provides for the indorser's liability in case the plaintiff fails to "support his action." In the present case Andrews did support his action, and recovered judgment against the defendant Ludlow. *Fairbanks* v. *Townsend*, 8 Mass. R. 450.

Cooke, for the plaintiff, being directed by the Court to confine himself to the last point, said that a trustee was a defendant within the meaning of the statute. A *defendant* means

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any one who *defends*. With regard to this defendant Chapman, the plaintiff Andrews did not "support his action." He cited *Wells* v. *Banister*, 4 Mass. R. 514; *Jacobs* v. *Mellen*, 14 Mass. R. 132.

March 16th, 1829.

PARKER C. J. delivered the opinion of the Court. Upon the first point made by the defendant's counsel, we are of opinion that the form of the indorsement does not avoid the liability of the attorney created by the statute 1784, *c.* 28, § 11.

The intention of the legislature was, to give a remedy for costs to the defendant who was unjustly sued, against the attorney as well as the plaintiff, unless the plaintiff himself should indorse the writ in his own proper person.

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The statute provides, that all original writs &c. shall be indorsed by the plaintiff or plaintiffs, or one of them, or by his or their agent or attorney; and in a subsequent clause of the same section, that the plaintiff's agent or attorney, who shall so indorse, shall be liable, &c.[1]

It has been usual, when the attorney indorsed, to omit the name of the plaintiff, and in this case it being indorsed more specially, viz. in the name of the plaintiff by the attorney, with his name as such, it is thought this is not an indorsement by the attorney, within the meaning of the statute, but an indorsement by the plaintiff himself. But this is a refinement which hardly entered into the contemplation of the legislature, and indeed will not bear the test of reasonable examination. The common indorsement is nothing more nor less than an abbreviation of this, and means the same thing. *A. B. attorney* means exactly the same thing, as *C. D. by his attorney A. B.* In the case of *Chadwick* v. *Upton*, 3 Pick. 442, the Court gave the same construction to the statute on a different question.[2]

Upon the second objection we think the defendant ought not to prevail. It is, that the trustee is not entitled to costs, because he did not swear to the truth of his answers in court.

[1] See Revised Stat. *c.* 90, § 10 to 13.

[2] See *Robbins* v. *Hill*, 12 Pick. 569; *Clark* v. *Paine*, 11 Pick. 66; *Davis* v. *M'Arthur*, 3 Greenleaf, 27; *How* v. *Codman*, 4 Greenleaf, 81, 82, and note; *Harmon* v. *Watson*, 8 Greenleaf, 286; *M'Gee* v. *Barber*, 14 Pick. 212; *Skillings* v. *Boyd*, 1 Fairfield, 43; *Stevens* v. *Getchell*, 2 Fairfield, 443; *Rowe* v. *Truitt*, 14 Maine R. (2 Shepley,) 393; *Miner* v. *Smith*, 6 N. Hamp. R. 219.

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The statute of 1794, *c.* 65, § 3, provides, that if any supposed trustee shall come into court the first term, and declare, &c. and shall thereupon submit himself to an examination, upon oath, &c. the court shall award him his legal costs. We understand in this case, that the trustee, the present plaintiff, did come into court the first term and offer himself for examination, but not upon oath, he having afterwards sworn to his answers out of court. This by the statute of 1817, *c.* 148, § 2, he was allowed to do. It has not been deemed necessary that the mere general denial of effects, which is usually made at the first appearance, should be under oath, if an examination on interrogatories is intended; the oath is generally administered at the close of the examination. And this course is quite consistent with the views of the legislature; who intended to prevent any delay on the part of the trustee, by making his title to costs depend upon his presenting himself for examination at the first term; if he does so, and is not examined, it is the fault of the plaintiff, and the trustee ought not to be deprived of his costs. If the plaintiff is satisfied with
28 the general denial of effects, in order to be discharged and to have his costs, the trustee must make oath to his general answer.

There having been here an appearance the first term, and a submission to examination, and the trustee having been discharged, he is entitled to his costs, though he did not swear to the truth of his answers in court; for by the statute last cited, in all cases where any supposed trustee has appeared in court and submitted himself to examination on oath, that is, where he has offered himself for such examination, his answers may be sworn to before any judge of the Court of Common Pleas, or any justice of the peace. This provision was not intended to vary, in any manner, the grounds upon which he should be entitled to his costs.[1]

The remaining question is more difficult, and seems never to have been presented for judicial decision, viz. whether by virtue of the statute first above cited, the attorney who has indorsed the writ is liable for the costs of the trustee as well as for the costs of the principal.

[1] See Revised Stat. *c.* 109, § 11, 12, 49.

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And we do not think such liability can be inferred from the words or the spirit of the statute of 1784. The general object certainly was, to provide a security for costs, for the defendant in a common suit between party and party. It is enacted, that the plaintiff's agent or attorney, who shall indorse the writ, shall be liable, in case of the avoidance or inability of the plaintiff, to pay the defendant all such costs as he shall recover, and shall pay all prison charges that may happen when the plaintiff shall not support his action. The case contemplated is, when the plaintiff shall fail to support his action; but he may support his action, and yet the person summoned as trustee may be discharged; so that the case before us does not come within the words of the statute. Nor does it come within its spirit and intention; for the intention of the legislature seems to have been, that the attorney who indorses should guaranty the validity of the suit, so far as to indemnify the person sued against a groundless suit; and it was he only that was intended to be secured, the defendant in the action; and we cannot consider the person summoned, to be in any sense the defendant. He has nothing to defend against, for it is wholly immaterial to him whether the suit 29 against the principal is just or unjust. If he owes him money or has his goods, he discharges himself by paying to one who is substituted by the law as his creditor.

Besides, here, the plaintiff prevails in the original suit, and obtains judgment against the defendant; so that the very condition on which the liability of the present defendant as indorser happens, has failed.

In the case of *Fairbanks* v. *Townsend*, 8 Mass. R. 450, the Court considered the liability of the indorser as depending upon the failure of the plaintiff to support his action. The provision of the statute was construed strictly, and by the same rule of construction applied to this case, the defendant cannot be held liable.[1]

Plaintiff nonsuit.

[1] See Revised Stat. c. 90, § 11.

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THOMAS HANCOCK, Appellant, &c. *versus* WILLIAM MINOT, Executor.

The widow of an intestate had her dower assigned to her in all his real estate. Afterward a judgment was obtained against his administrator on a demand for which the intestate was liable as a surety, and the real estate not assigned as dower was sold by the administrator under a license of court, and the proceeds applied in satisfaction of the judgment. The administrator then brought a suit and recovered judgment against the principal debtor, and levied on his land. It was *held*, that the administrator did not stand seised and possessed of this land for the benefit of the widow and heirs, but of the heirs alone, their portion only of the intestate's real estate having been taken to discharge the judgment against the administrator; and that the case did not come within the spirit and intention of St. 1788, c. 51, § 3, which provides, that whenever an administrator shall recover a judgment and levy on land, he shall stand seised and possessed of such land to the use of the widow and heirs of the intestate.[2]

WILLIAM MINOT, as executor of the last will of Elizabeth Hancock, widow of Ebenezer Hancock, presented a petition to the judge of probate, representing that J. G. Rogers, as administrator *de bonis non* of the estate of Ebenezer Hancock in 1823, recovered judgment against John Hancock for the sum of 60,825 dollars, being for debts due from John to the estate of Ebenezer, and afterwards sued out a writ of execu-
30 tion on the judgment, and on May 13, 1823, levied upon certain land of John, being an undivided sixth part of the mansion house estate of the late governor Hancock; that this undivided sixth part was appraised at 18,710 dollars, which sum is credited in the administration account of Rogers; that Rogers now stands seised and possessed of the whole estate in the land set off to him on execution, in trust for the sole use and behoof of the widow and heirs of the intestate, and that it is not necessary for the payment of debts, legacies, annuities, or charges of administration, and that it ought, by law, to be distributed as the personal estate of the intestate, and one third of it assigned to the petitioner as executor of the widow. The petition concludes with a prayer of distribution accordingly.

Thomas Hancock filed an answer to the petition, in which

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[2] See Revised Stat. c. 73, § 52, and c. 65, § 13.

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he states, that Ebenezer Hancock died intestate, leaving a widow (Elizabeth above named) and two sons (John above named and Thomas the respondent); that Ebenezer died seised of much real estate, and of but little personal estate; that a considerable portion of the personal estate was allowed to the widow by the judge of probate, and her dower duly assigned to her in all the intestate's real estate lying within this Commonwealth; that though the personal debts of the intestate were very small, yet that he was surety for his son John for a large amount; that the creditors of John commenced suits against Rogers as administrator of Ebenezer, and under a commission of insolvency, and by virtue thereof, recovered judgments against the administrator to the amount of 57,435 dollars, and the administrator, in order to satisfy the debts, sold real estate of Ebenezer, of one half of which the respondent as one of the heirs was then seised, under a license of court, obtained for that purpose, to an amount sufficient to pay the demands; that by reason thereof a debt was created in favor of the administrator against John, and in consequence thereof the administrator commenced an action against John, and recovered judgment for the sum of 60,825 dollars, and levied an execution on his real estate and on certain equities of redemption; the whole amounting to 26,030 dollars, and the estate mentioned in the petition being appraised and set off at the sum of 18,710 dollars. The respondent admits that this estate has never been distributed by the Court of Probate, but he denies that the widow, or her executor, has a right to any part of the same. 31

The judge of probate, after hearing the parties, decreed that the administrator was seised and possessed of the land set off to him on execution, for the sole use and behoof of the widow and heirs of Ebenezer Hancock, and ordered a distribution of the same as of personal estate, viz. to the executor of the widow and to John and Thomas one third part each.

From this decree Thomas appealed for the following reasons: —

1. Because the estate in question was not the proceeds of debts due to Ebenezer in his lifetime, and in which alone his widow could be interested: —

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2. Because the moneys paid by the administrator for account of John, were not a part of the personal estate of Ebenezer; in consequence of which the widow's share of the personal estate was not diminished by such payment: —

3. Because the dower of the widow in the real estate of Ebenezer had been set out before the sales under the license of court: —

4. Because the real estate in the hands of the administrator is in place of the real estate of Ebenezer which had been sold for the payment of debts, and is to be distributed and disposed of in like manner: —

5. Because, so far as it can be considered as personal estate, as such it is to be appropriated for the payment of debts, and to be applied, in the settlement of the estate, to the relief of the real estate and to the protection of the heirs at law: —

6. Because the judge of probate has not marshalled the assets of the estate of Ebenezer according to the true intent and meaning of the statute of distributions of intestate estates.

The petition was founded on *St.* 1788, *c.* 51, § 3, which provides, "that whenever any executor or administrator shall recover judgment for any sum of money, whereon execution shall issue, and lands, tenements or hereditaments shall be set off to the said executor or administrator, in discharge of the said execution, the said executor or administrator shall be
32 seised and possessed of the whole estate in the lands, tenements or hereditaments so set off, to the sole use and behoof of the widow and heirs of the deceased intestate, or to [the use of] the residuary legatee or legatees of the testator, as the case may be; and the Court of Probate may make distribution of the same, as of personal estate, accordingly; unless the lands, tenements or hereditaments so set off on the said execution, shall be necessary for the payment of debts, legacies, annuities or charges of administration."

The 2d section contains a similar provision in regard to land mortgaged to the intestate, of which the administrator shal. recover seisin and possession.

June 24th, 1828.

W. J. Hubbard, for the appellant. In construing a statute, the intention and not the letter is to govern. Bac. Abr. *Statute*, *I*, 5. By the law, as it existed in 1786, the widow of an

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intestate was entitled to dower, and to one third part of the surplus of his personal estate, after the payment of his debts; and in case the personal estate should be insufficient to pay the debts, she was to have so much of the personal estate as the judge of probate should determine to be necessary. Anc. Chart. &c. 205, § 3; ibid. 230; *St.* 1783, *c.* 36, § 3. The statute of 1786, *c.* 5, § 3, contains a provision like that of 1788, *c.* 51, § 3, except that it does not mention the widow. The preamble of the statute of 1786 recites that doubts had arisen as to the estate of an executor or administrator in land mortgaged to the testator or intestate, or taken in execution at the suit of an executor or administrator for the payment of debts due to the estate of the person deceased, and the statute enacts that such land shall be assets. These doubts probably gave rise to the other provisions of the statute. If that statute had continued in force, it would have been questionable whether the widow could receive any benefit from the land so mortgaged or taken in execution, and whether the whole would not have gone to the heir. When the statute of 1788 was made, it was discovered that there was no express provision, in such cases, for an equitable distribution in regard to the widow. If a large portion of the estate of the deceased consisted in choses in action and payment were enforced by extending on land, the widow might have had no benefit from it, though it was intended that she should have one third of the personal estate. 33
So if debts due to the deceased had been secured by mortgage, and the administrator had entered to foreclose. The sole reason for inserting the provision as to the widow, was to secure to her an equitable proportion of the personal effects so turned into real estate. It cannot be supposed that the legislature intended that she should have one third of the intestate's real estate assigned to her as her dower, and a fee simple in one third of the residue; which would virtually be the operation of the statute in some cases, if the petitioner's construction is adopted. *The People* v. *Utica Ins. Co.* 15 Johns. R. 380.

Another rule is, that if divers statutes relate to the same thing, they ought to be all taken into consideration in construing any one of them. Bac. Abr. *Statute, I*, 2. If the statute of 1788 would bear the construction given to it by the petition-

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er, it is controlled by the subsequent statue of 1805, *c.* 90, which provides (§ 2), that after an allowance of necessaries to the widow, the personal estate shall first be applied to the payment of the intestate's debts. The real estate is liable to debts, only in case of a deficiency of personal estate. And by the statute of 1788, the land in the administrator's hands by virtue of an extent, is not to be distributed, if it is wanted to pay debts. Here it is required for that purpose. Unless the personal estate of the intestate is sufficient to meet all his debts, the widow has no claim upon land taken on execution by the administrator.

The statute contemplates that the debts for which the land is taken by an administrator, were due to the husband at the time of his decease. This was not a debt due in equity to the deceased, but to the appellant, as his real estate was taken to pay the creditors.

Peabody and *Minot*, for the appellee. To the argument that the debt from John Hancock was not due to the intestate at the time of his decease, and so the widow has no interest in it, we reply, that neither did this real estate belong to him at that time. The claim of the heirs is founded on the same statute as the claim of the widow. Before the statutes of 1786 and 1788, it was doubtful whether land taken on execution by an administrator must not have remained in his hands; but
34 those statutes directed that it should be assets and be distributed as personal estate. The statute of 1805 is not inconsistent with that of 1788, and if it were, it would operate equally against the heirs as against the widow.

There is no equity on the part of the appellant. It is true that he had a property in the real estate taken to pay the debt of Ebenezer Hancock, but it was a qualified property. The land descended to him subject to the debts and liabilities of the ancestor; it was not like land purchased by the appellant for a valuable consideration. The appellant does not complain that his real estate was sold illegally. It was necessary to convert it into personal estate, and when so converted, it did not differ from any other personal estate of the intestate. *Brazer* v. *Dean*, 15 Mass. R. 184. Suppose a Spanish claim had been allowed to the administrator under the Florida treaty

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might not the appellant have then said, with as much equity as he does here, that his real estate having been taken to pay the debt of the intestate, he was entitled to be indemnified out of the sum received by the administrator? Had the legislature so intended, they might easily have provided, that if the real estate sold to pay debts should affect the heirs only, any reimbursement to the administrator should be for their sole benefit.

S. Hubbard, in reply. The land in question is the proceeds of the intestate's real estate, and the widow is not entitled in equity to any part of it. The administrator is a trustee of this land. *Boylston* v. *Carver*, 4 Mass. R. 598. It is a "trust arising in the settlement of an estate," and so by *St.* 1817, *c.* 87, is within the equity jurisdiction of this Court. The only question would be, whether the case is in a proper form for the exercise of such jurisdiction; but the proceedings of a court of probate by decrees, are similar to those of a court of chancery, and as this Court has full chancery power over the subject, they will not turn the appellant round to his bill in equity. *Gibbs* v. *Ougier*, 12 Ves. 413. When the court have once equitable jurisdiction of a case, they will follow it through and make a final equitable disposition of it. In the case of a surety paying a bond, a court of equity will put him in the place of the obligee, in regard to any remedy against the principal debtor. Ebenezer Hancock, as a surety, might in equity have compelled the creditor to levy on John Hancock's 35
estate. The widow would then have had no claim. The suretyship descended with the real estate of Ebenezer, and the appellant is entitled to stand in the place of the surety. The land acquired by the administrator, is in lieu of that which was sold by him. *Kidney* v. *Coussmaker*, 12 Ves. 154.

The Court will marshall the assets and will consider this land in the hands of the administrator as real estate; and the appellant, having paid the debt of his co-heir, will stand in his place. *Hays* v. *Jackson*, 6 Mass R. 149; *Lanoy* v. *Duke &c. of Athol*, 2 Atk. 444; *Clifton* v. *Burt*, 1 P. Wms. 680; Toller, 418; *Mills* v. *Eden*, 10 Mod. 488; *Cheesebrough* v. *Millard*, 1 Johns. Ch. R. 413; *Livingston* v. *Newkirk*, 3 Johns. Ch. R. 312.

The petitioner must rely entirely on a literal construction of

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the statute. Then we say, by a like construction, that the debt recovered of John Hancock was not a debt due to the estate of the deceased, which means, due to the deceased in his lifetime; the intestate had no claim against John Hancock; so that the case is not within the statute.

March 16*th.* 1829.

WILDE J. delivered the opinion of the Court. This case has been argued upon the facts stated in the petition and in the answer of the respondent; which we understand to be agreed by the parties. The petitioner contends, on these facts, that the administrator stands seised and possessed of the real estate set off on execution, in trust for the sole use and benefit of the petitioner as representing the widow of Ebenezer Hancock, and of the heirs; and the general question is, whether the administrator is so seised, and whether the judge of probate is authorized by law to order the estate to be distributed among the widow and heirs of Ebenezer Hancock as a part and portion of his personal estate.

This question depends on the construction of *St.* 1788, *c.* 51, § 3. The respondent contends, that the provision is limited to lands, tenements and hereditaments taken on execution by executors or administrators for debts due to the deceased, and that the intention of the legislature so to limit it, is expressed in the preamble to the statute. The intention, however, expressed in the preamble, is to remove doubts and to

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declare the law "with respect to the extent of the right, interest, title and estate, which executors or administrators may have in houses, lands and tenements, set off by execution, at the suit of executors or administrators, for debts due to *the estates* of persons deceased." This language of the preamble is not inconsistent with that of the 3d section. Both refer not only to debts due to the deceased, but to debts due to the estate of the deceased, at the time when judgment may be recovered by an executor or administrator, and must include all debts for which the executor or administrator is bound to account in the probate office. But if he should institute a suit and recover judgment in his name as executor or administrator for a debt not belonging to the estate, the statute in such case would not apply, and the general words of the 3d section would be limited and restrained by the words of the preamble

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For instance, suppose the deceased had, before his death, assigned a chose in action, and that it afterwards became necessary for the administrator to institute an action in his own name for the use of the assignee, and that on judgment recovered, execution should issue and be extended on real estate. In such a case the administrator would not be seised for the use of the widow and heirs, but for the sole use of the assignee of the chose; it would therefore not be a case within the meaning of the statute, the judgment not being recovered for a debt due to the estate of the deceased.

In the present case, however, it is clear, we think, that the debt on which judgment was recovered was a debt belonging to the estate of the deceased. It was founded on an implied promise to the deceased, to indemnify him against his liability as surety for his son John Hancock, and it was recovered for the use and benefit of the estate of the deceased. The administrator was bound to account for it in the probate court, and he has so accounted, as stated in the petition. True it is, that the debt was not due to Ebenezer Hancock at the time of his decease, nor was it a debt due to the estate at the time when administration was granted or when the estate was inventoried; but it belonged to the estate when judgment was recovered by the administrator, and when execution was extended on the real estate in question. And this we think sufficient to bring the case within the meaning of the statute.

The only remaining question is, whether the estate in question is necessary for the payment of the debts &c. of the deceased, within the true meaning and intention of the statute. 37

It must be admitted that the affirmative of the question cannot be maintained, if the statute is to be construed strictly and according to the letter. The estate in question is not now necessary to pay the debts of the deceased, nor the legacies, nor the charges of administration. The respondent admits that these have already been discharged in the manner before stated. But cases frequently occur which cannot be brought within the letter of the law, and which are nevertheless manifestly within its spirit and meaning. When, therefore, a case is to be considered, which is excluded by the literal construction of a statute, the question always is, does it come within its

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meaning, or is it *casus omissus*. So if a case is included by a literal construction, still the question is, whether it is within its true meaning. Laws are made to settle general principles and rules, and it is impossible for the legislature, when an act is framed, to have in contemplation all cases which in the course of business may possibly occur. The meaning, therefore, of a statute is not always to be ascertained by the language of it alone. Other aids may be necessary, and are to be considered according to the settled rules of construction.

The cause and necessity of making a statute are therefore to be regarded, and also the state of the law at the time, relating to the subject matter of its provisions, so as to be the better able to determine what remedy was intended, and to what extent the previously existing law was meant to be changed. It is said, the best construction of a statute is, to construe it as near to the rule and the reason of the common law as may be. Bac. Abr. *Statute I*, 4, 5, and the cases there cited.

It may be material therefore to consider how the law stood as to marshalling assets in the hands of executors and administrators, at the time of the passage of the act.

The law in this respect was perfectly well established and known. In all cases the personal estate was to be first applied to the payment of debts and legacies, unless they were charged on the real estate by will, nor would this even exonerate the
38 personal estate, unless there were express words to that effect, or unless such was the plain intent of the testator. *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454; *Watson* v. *Brickwood*, 9 Ves. 447. This had been the established law of the land from the first settlement of the country, and it had before been the law of England from time immemorial. It is not to be supposed that the legislature intended to change this well established principle of law. On the contrary, the language of the statute plainly recognises the principle, that the personal estate should be applied to the payment of debts and legacies, before any part should be distributed among the widow and heirs.

Another principle of law also was well established, namely, that if an executor or administrator pays, out of his own money, debts to the value of assets in hand, he may apply the as-

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sets to his own use, towards satisfaction of the moneys he has expended. *Livingston* v. *Newkirk*, 3 Johns. Ch. R. 318. If therefore the administrator had paid the judgments recovered against the estate of the deceased with his own funds, he would be entitled to reimbursement out of the effects of the judgments afterwards recovered against John Hancock the principal. By means of substitution, he would have all the rights of the creditors of the deceased whose debts he had discharged. If a creditor exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities as if he were a purchaser. *Cheesebrough* v. *Millard*, 1 Johns. Ch. R. 413. And this right of substitution is founded on the most manifest equity. The same right of substitution would attach to heirs, if they should pay a debt of the deceased to prevent execution from being extended on the real estate. And when the real estate belonging to the heirs is sold for this purpose by the administrator, the same principle we think applies with equal force. The estate of the heirs being sold for the payment of the debts of the deceased, the heirs have a right to be substituted in the place of the creditors.

According to these well known principles, and substituting the heirs in the place of the creditors paid, the estate in question may with great propriety be said to be necessary for the payment of the debts of the deceased, and we are of opinion that this is the true meaning and construction of the statute.

It has however been objected, that the principle of substitution is a principle of equity and not of the common law; and therefore, that it is not to be regarded by this Court sitting as a court of probate. To this objection two answers have been given. First, that courts of probate proceed according to the course of the civil and ecclesiastical law, and have indeed equity powers in many cases; and that the statute in question expressly gives to the court equity powers, for it declares that the executor or administrator shall in certain cases hold real estates in trust, and that the execution may be enforced by the Court of Probate. The second answer is, that if the Court of Probate is not clothed with equity powers and is not to proceed upon rules of equity, yet this Court sitting as a court

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of equity has jurisdiction over the case, and has power to enforce the trust, whatever it may be, according to the rules and principles of equity. If then this is a proper case to be brought before a court of equity, this petition should be dismissed; for certainly this Court will not proceed to order distribution as prayed for, when we perceive that as a court of equity we shall be obliged, if required, to make a different distribution.

The question now is, whether the administrator is seised and possessed of the estate in question, in trust for the use of the widow and heirs, as stated in the petition. This depends on the construction of the statute as relating to the facts agreed. And upon these facts, we think the administrator is not so seised, but that he is seised in trust for the use of the heirs whose property has been taken and appropriated to pay the debts of the deceased, and who have a clear right, as we think, to be substituted in the place of the creditors to whom payment has been made.

The result is, that the decree of the judge of probate must be reversed, and the petition be dismissed.

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JOHN CROPPER *et al. versus* CALEB ADAMS *et al.*

A remitted from the United States to W, his general agent in London, certificates of shares in the United States Bank which stood in A's name, and the usual blank powers of attorney to transfer them. W sold the stock to C, and at the bottom of the bill of parcels delivered C, signed an agreement, by which, in consideration of the purchase money, he guarantied the regularity of the documents, and promised "to be accountable for such dividends as may become due and be received by me or my agent from the 1st day of January, 1820, until transfer, provided such transfer be made within twelve months from this date." After this sale, on May 18, 1825, W wrote to A, requesting him, if the stock was not transferred by July 1st, to receive the July dividend, adding, "which I must pay to the purchaser." A accordingly received the July dividend, and by the next packet remitted to W funds to a much larger amount than the dividend, intending them for the payment of the dividend and other mercantile uses, though nothing was specified as to the mode of appropriating the funds. This remittance made W indebted to A, and he continued to be so until he became bankrupt in October, 1825, never having paid the dividend to C. C, in May, 1826, demanded this dividend of A, who had never before known who purchased the stock. In an action brought by C against A for money had and received to recover the amount of this dividend, it was *held*, that A was originally accountable to C for the dividend; but that the words of the contract made W the agent of C to receive the dividend, and consequently that the remittance to W exonerated A from any claim by C; and that as the remittance brought W into A's debt, it was not necessary to specify the object of the remittance in order to produce this effect.

ASSUMPSIT for money had and received, brought by the plaintiffs, merchants of Liverpool in England, against the defendants, merchants of Boston, to recover the dividends which had been received by the defendants on certain shares in the United States Bank. The case was submitted on an agreed statement of facts.

The defendants, in the spring of 1825, remitted to Samuel Williams, a banker and commission merchant in London, one hundred and thirty shares in the stock of the United States Bank, owned by them, to be sold on their account. Williams, on April 19, 1825, sold to the plaintiffs, through a broker, eighty shares, and then made and signed the following documents: —

"London, 19 April, 1825.

Dr. to Samuel Williams for the following U. S. Bank shares with the dividend from the 1st day of January, 1825.

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No. 387 — 25 in the name of C. & C. F. Adams.
" 374 — 55 " " " " " "

80 a £25 per share.

London, 23 April, 1825.

Received of the sum of pounds, being the full purchase money for the abovementioned bank shares, of the United States of America, certificates for which I now deliver with power of attorney for transferring the same; and do hereby guarantee the regularity of said documents, and promise to be accountable for such dividends as may become due and be received by me or my agent from the 1st day of January, 1825, until transfer, provided such transfer be made within twelve months from this date.

S. WILLIAMS."

On the 10th of May, 1825, Williams sold to the plaintiffs the remaining fifty shares, giving a similar document.

These documents were made in blank to enable purchasers to dispose of the stocks and transfer them by delivery of the documents. But the defendants were not informed to whom the documents were sold or delivered.

The stock continued to stand in the defendants' names in the books of the bank until after January, 1826; and they, by the usages of the bank, were entitled to receive the dividends on the shares standing in their names, without producing the certificate of ownership. On July 18, 1825, a dividend of profits was made by the bank of two and three quarters per cent, amounting on the 130 shares to 357 dollars 50 cents, and a like dividend of the same amount was made January 18, 1826, both of which were received by the defendants. The defendants on June 29, 1825, received a letter from Williams, dated London, May 18, 1825, in which he says, "I beg your reference to my respects of the 28th ult. and confirm the same, except as to the transfer of the bank shares, upon which I paid the dividend to the 1st of Jan. last. Since then I have ascertained that they have not been yet transferred, and if you find that also to be the case on the 1st of July next, you will re-

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ceive another half year's dividend, and I must pay it to the purchaser here."

The defendants, after having received the July dividend, remitted to Williams by the next packets on 22d and 30th of July, 2227*l.* in exchange, which was received August 22d and 31st, and became cash September 24th and October 3d, 1825, for the payment of this dividend and other mercantile uses, but without any specification of the dividend or other purposes. Williams, by these remittances, became indebted to the defendants, and has ever since continued so.

Williams became bankrupt October 25, 1825, and has never paid the plaintiffs, nor any one else, the amount of the dividend. After Williams's bankruptcy, the plaintiffs, by their agents, made a demand on the defendants for the dividends which they had received; the defendants paid the dividend of January, 1826, which they had received after they knew of Williams's bankruptcy, but declined paying that of July, 1825.

The letter of attorney to Williams, and his receipt and guaranty and bill of sale, continued in blank, and might have been transferred indefinitely up to May, 1826, without any possibility of the defendants' knowing who was the owner, and they were never informed, until that time, that the plaintiffs were the owners.

The defendants were to be defaulted or the plaintiffs to become nonsuit, according to the opinion of the Court.

The case was argued in writing.

Shaw, for the plaintiffs. Williams, in selling the stock, was agent for the defendants. The dividends from January 1, 1825, passed by the express words of the contract, and even without any express words, the dividends declared after the time of the sale, would belong to the purchasers. The dividend of July, 1825, therefore, belonged to the plaintiffs, and when the defendants received it, they received it for the use of the plaintiffs, and became liable to account for it to the plaintiffs in an action for money had and received. If it is objected that the defendants are thus made liable to persons whom they did not know, it is sufficient to reply, that they voluntarily chose to incur a liability of this kind, by sending out their powers of attorney to transfer the stock, in blank. This they did, be-

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cause they thus made the shares transferable more conveniently, and therefore more saleable. Every person who becomes party to a negotiable instrument, may in the same manner become liable to an unknown person.

It may be argued on the other side, that the defendants were agents of Williams, and that this is proved by the words of the instrument given by Williams. But the mere calling one party an agent does not make him so; whether he is agent or not, must depend on the relation in which the parties stood to each other. The defendants could not have been agents of Williams in receiving this dividend, for Williams had no interest in the stock, and could not have received the dividend himself. The word "agent," which is inapplicable in this case, was adopted carelessly, because a printed form was used which contained this word. The printed form was undoubtedly intended for a person who was himself owner of the stock.

The obligation of the defendants, created by the transfer, was direct, to pay such dividends as they received, to the plaintiffs. The guaranty of Williams was a collateral undertaking that the dividends should be paid; and did not supersede or discharge the liability of the defendants.

If it is contended, that the defendants are exonerated in consequence of their having placed funds in the hands of Williams, sufficient to pay the plaintiffs this dividend, we reply, that Williams was not the agent of the plaintiffs, but of the defendants, and if he became bankrupt with the money of the defendants in his hands, it is their loss, and not the loss of the plaintiffs. Besides, no part of the money of the defendants in Williams's hands was ever specifically appropriated by them to the payment of this dividend; he, therefore, could not have received any part of it as agent for the plaintiffs.

Loring, for the defendants. The sales of the stocks by Williams to the plaintiffs was a sale by him as *owner* of the stocks, and not a direct sale from the defendants to them through his agency. This is evident from the language of the instruments in the case. The defendants, in receiving the dividend, acted as agents, and, having paid it over to him, cannot be under any liability to the plaintiffs.

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If, however, the sale is to be considered as immediate from the defendants to the plaintiffs through the agency of Williams, still the payment to Williams exonerates the defendants, because by the terms of the instrument of sale Williams became the authorized agent of the plaintiff to receive these dividends. A payment to him, therefore, was the same as a payment to his principals. Besides, the name of the plaintiffs as purchasers, was never made known to the defendants until after this dividend was paid to Williams. And it is well settled, that a payment to an agent dealing as such, without disclosing the name of his principal, is a good payment in discharge of the debt. *Morris* v. *Cleasby*, 1 Maule & Selw. 576 ; 1 Chit. Pl. 25 ; *George* v. *Clagett*, 7 T. R. 359, and notes ; Montagu on Set-off, 29, 31, and notes ; *Drinkwater* v. *Goodwin*, 1 Cowp. 251.

It cannot fairly be denied, on the other side, that the remittance to Williams was intended as a payment of this dividend, although it was not specified, since the remittance was made soon after receiving Williams's letter requesting them to receive and remit the dividend, and was to such an amount as left Williams deeply in their debt.

March 16th, 1829.

PARKER C. J. delivered the opinion of the Court. This is somewhat of a difficult question, and it seems there are no authorities to assist us in coming to a decision, for in the elaborate argument submitted in writing, none are cited, except to a point which is sufficiently clear, viz. that payment to an agent, while his authority continues, and without prohibition from the principal, shall be a discharge against the principal. The argument on both sides consists of reasoning from well known principles, and an application of those principles to the case submitted ; and we must take the same course to arrive at a decision.

First, then, it is clear from the facts stated, that Williams, in the sale of the shares, was merely the agent of the defendants. He was *their* factor in London, and they sent him these shares to sell *on their account*. He sold for cash, and credited them in his books for the proceeds. The sale was made in such form as to enable the purchaser to sell the same shares by delivery only of the documents which he had received ;

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and the documents were sent on to enable the factor to make such a sale. They were not remitted to him, like a bill, to take to his own account, but as a means of raising money for the use of the defendants. Williams might have sold them without any personal guaranty or liability, if he could have disposed of them on those terms. If he *might* have taken them to his own account, he did not, for the sale was made on May 10, 1825, and on the 18th of that month he informs the defendants by letter, that he had sold on *their account*, and he renders an account of his agency.

He undertakes to guaranty the genuineness of the documents, and for this he charges a commission, and he stipulates for the payment of all dividends after January 1, 1825. This was necessary, as those dividends remained payable to the defendants until the record of ownership should be changed in the bank; but this seems to be an independent obligation on his part, which does not affect the liability of the defendants; for such dividends as they might receive, by virtue of their credit on the books of the bank for the same, the bank knowing of no proprietor but them, until a transfer should be made on the books, would certainly be received by them to the use of the purchasers. Suppose that on the failure of Williams the first dividend had not been remitted to him, could it be doubted that the *bonâ fide* holders of the shares could recover the dividend received by the defendants? Did they not in law receive it to the use of the owners of the shares? By virtue of the contract of sale made through their agent, the defendants had parted with the shares and the dividends accruing; they became in equity the agents of the purchaser in receiving the dividends, and if they had refused to receive, as the purchaser would not, by the rules of the bank, be able to obtain payment without their agency, I think an action would lie against them for this refusal or neglect, because when they sold the shares, with the dividend on and accruing, and their agent in the sale had given a year for the transfer in the books, they undertook by implication to receive for the purchaser what he could not receive but through them.

Does the contract of the factor with the purchaser to guaranty the stock and the payment of the dividends, destroy this

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liability of the principals to the purchaser? I do not see that it can. It is merely an assurance that the defendants will do their duty, and such assurance was probably necessary to a sale for the full value, as the vendors were strangers, living in a foreign country.

Then the question remains, whether Williams is to be considered as agent for the purchasers, so that a remittance to him of the dividend will discharge the defendants; and I think this is settled by the terms of the contract made by Williams and accepted by the plaintiffs. He promises to be accountable for such dividends as may become due and be received by him or his agent, from the 1st of January, 1825, until transfer. Why is not this an agreement on the part of the plaintiffs, that Williams shall receive, or employ some one to receive? And if so, the defendants having had notice from Williams that he was to receive, accompanied with a request that the defendants would obtain the dividends, stating that he should pay them, a remittance until prohibited must be a payment as it regards the defendants. And it is to be considered, that the defendants were wholly ignorant who were the purchasers or in whose hands the certificates were, so that they could not remit to any person but Williams. After the bankruptcy of Williams, and notice to them who the owners were, they were bound to pay to the owners the future dividends, and they have done so.

It is agreed that the remittance made by the defendants to Williams in September and October, 1825, was *for this dividend* and for other mercantile uses. If Williams was the agent to receive, it cannot make a difference, that there was no specification of the dividend as an object of the remittance. The defendants being then creditors of Williams, he could have applied the remittance to this object. If they had been indebted, a particular appropriation might have been necessary.

We think on this last ground the defendants are discharged, and that the plaintiffs must look to the estate of Williams.

It is suggested in the argument for the plaintiffs, that the payment by the defendants to the plaintiffs of the dividend last received, which was after the bankruptcy of Williams and after notice of the plaintiffs' right, is a recognition of the right

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of the plaintiffs. That right cannot be disputed after notice to the defendants; but before that, to whom should the defendants have remitted, if not to Williams? Certainly to nobody; and yet they were requested by Williams to remit to the plaintiffs, he having engaged to pay. We cannot imagine a stronger case of authority to receive, than Williams had, by virtue of the written acknowledgment of the plaintiffs in their receipt. They looked only to him for the dividends, and in consequence of this arrangement and of the notice by Williams to the defendants, the remittance was made.

Plaintiffs nonsuit.

URIAH OAKES, Petitioner, &c. *versus* CHARLES HILL.

On an application for a *mandamus* to compel the clerk of a parish to give the petitioner a certificate of his having become a member of the parish, in order that he might file it with the clerk of the religious society which he wished to leave, the *mandamus* was refused, on the ground that the petitioner had a remedy by action, and a decision on this summary process might affect the rights of persons who had not been heard.

Jan. 3d, 1829. OAKES, an inhabitant of Malden, wishing to become a member of the first parish in that town, applied to Hill, the parish clerk, for a certificate of his having joined the parish, in order that he might file it with the clerk of the religious society to which he had previously belonged, as evidence of his having left that society. Hill refused to comply with the request, and Oakes now applied for a *mandamus* to compel him to grant such a certificate. The case involved the question, whether any person had a right to become a member of the parish without their consent.

The petition was supported by *Fletcher*, and opposed by *Shaw* and *Peabody*. The counsel on both sides were desirous of obtaining the opinion of the Court upon the merits of the case.

March 17th. But at this March term the Court said they had come to the conclusion, that it was not proper to issue a *mandamus*. They remarked that an action was pending in which the same questions might be tried, and that a determination on this summary

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process might affect the rights of persons who had no opportunity to be heard.[1]

CHARLES COLE *versus* HANNAH CUSHING. 49

The maker of a note, who has been committed to jail on execution on a judgment in favor of the holder, but has not paid the note, is still liable to be sued by an indorser who pays the amount of the note to the holder; and the suit of the indorser may be brought while the maker is still in jail in the prior suit.

An action for money had and received may be maintained by the indorsee of a note against the maker, although the note was signed by the maker merely for the accommodation of the payee, and the maker never received either money or any other consideration for signing it.

Where the holder of a note with several indorsers in blank, sues the maker and writes over the name of the first indorser an order to pay it to himself, the holder, but without striking out the names of the subsequent indorsers, he does not thereby discharge them; and therefore one of them who pays the amount of the note to the holder, may sue any of the prior parties.

THIS was an action of assumpsit for money had and received. The defendant was defaulted, with an agreement that the default should stand, or be taken off and a nonsuit entered, as the Court should determine on the following facts, disclosed at the trial before *Parker* C. J.

On May 23d, 1826, the defendant, at the request of her son Thomas Cushing, to whom she was not indebted, made a negotiable promissory note to him for 200 dollars, payable in four months and grace. This note was indorsed by Thomas Cushing to the plaintiff, to whom he was indebted; and the defendant knew that it was made for the purpose of being passed to the plaintiff. The note, after being indorsed by the plaintiff and Richard Martin, came to the hands of Charles Whitmore, who brought a suit thereon against the defendant and obtained judgment against her at the April term 1827 of the Court of Common Pleas, for 207 dollars 50 cents damages, and 19 dollars 84 cents costs. Over the name of Thomas Cushing, the first indorser on the note, was written "Boston 23d May, 1826. Value received, pay the within to Charles Whitmore," but the names of the subsequent indorsers were

[1] See *Oakes* v. *Hill*, 10 Pick. 333, and 14 Pick. 442.

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not struck out. Whitmore took out execution, and committed the defendant to jail upon it on May 16th, 1827. She was liberated June 10th, 1827, by taking the poor debtor's oath. On May 19th, 1827, the plaintiff gave his note to Whitmore for 250 dollars, being intended to cover the amount of the judgment and costs, and on the same day brought this action, and attached an estate which the defendant held as dower. The plaintiff was present when the defendant took the poor debtor's oath, and he neither opposed nor assented to her liberation, and did not inform her of the commencement of this suit; and it did not appear that she knew of this suit until June 18th, when the summons was left. Before she was liberated, but after the commencement of this suit, she had assigned her right of dower to other creditors.

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The defendant objected to the plaintiff's recovery, on the following grounds: — 1. At the time this suit was commenced, and long after, the defendant was in jail on Whitmore's execution, which the plaintiff knew; and while so in jail, the judgment, for the time being, was satisfied, and no action could be brought against her for any thing arising out of that judgment. 2. If any action could be maintained by the plaintiff upon the facts in this case, he could not maintain an action for money had and received. 3. By the indorsement made by Whitmore over Thomas Cushing's name, the plaintiff was discharged as indorser, and he could not, by a voluntary payment to Whitmore, entitle himself to an action against the defendant.

April 1st, 1828.

Peabody, for the defendant, in support of the first ground, cited *Brinley* v. *Allen*, 3 Mass. R. 561; *Porter* v. *Ingraham*, 10 Mass. R. 90; *Little* v. *The Newburyport Bank*, 14 Mass. R. 447; *Lyman* v. *Lyman*, 11 Mass. R. 319. As to the second ground, he cited *Haskins* v. *Dunham*, Anth. N. P. 81; 1 Chit. Pl. 342; *Barlow* v. *Bishop*, 1 East, 432; *Page* v. *Bank of Alexandria*, 7 Wheat. 37; *Willis* v. *Crooker*, 1 Pick. 204. It is true that it has been decided in New York, in *Pierce* v. *Crafts*, 12 Johns. R. 90, that an action for money had and received lies for the indorsee against the maker of a note, but such cannot be the law where it is proved, as in this case, that in fact no money was had and received. As to the

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third ground, he cited, Chit. on Bills, 149 ; *Smith* v. *Clark*, 1 Esp. R. 180 ; *Chaters* v. *Bell*, 4 Esp. R. 210.

Morse, contrà, to show that an action for money had and received lay, cited *Wild* v. *Fisher*, 4 Pick. 421.

PARKER C. J. delivered the opinion of the Court. The first ground taken in defence is, that the defendant being in prison on the execution in favor of Whitmore on a judgment recovered on this note, at the time when this action was commenced, she was not liable to this action. The authorities cited to support this position fall far short of it. The first merely decides, that when an arrest of the body is made on mesne process, estate being attached on the same writ, the attachment or the arrest is void, according to the fact of its being first or last made. *Brinley* v. *Allen*, 3 Mass. R. 561. The next case cited, so far as it touches the question, is directly against the position of the defendant.

March 23d, 1829.

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The present plaintiff was liable as indorser to Whitmore, on whose execution the defendant was in prison. Nothing would discharge the plaintiff from Whitmore's claim upon him (admitting no laches) but a satisfaction of the judgment by the defendant. The plaintiff had a right to pay the debt and look to the defendant's property for his security ; and, which is the second point in the case, had a right to this action of money had and received ; as was decided in the case of *Wild* v. *Fisher*, 4 Pick. 421.[1]

It is then insisted, that Whitmore having, when he sued, filled up the indorsement over the name of Cushing, who was the payee and first indorser, all subsequent indorsers were thereby discharged, and therefore the plaintiff paid the money in his own wrong, and having so done, is not entitled to his action against the maker. I have looked at the authorities cited, and do not find that they support this objection. They merely decide, that the holder *may* strike out all subsequent indorsers and declare upon an indorsement to himself of any one whom he intends to charge, or maintain his action in this way against the acceptor or maker. If he does not strike them out, there

[1] See *Ellsworth* v. *Brewer*, 11 Pick. 316; *Olcott* v. *Rathbone*, 5 Wendell, 490; Bayley on Bills (2d Am. edit.), 390 to 392, in notes.

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Cole v. Cushing.

seems to be no reason why he should not have recourse to them after he has failed to recover against the one first sued, if they are otherwise liable.[2]

Judgment for plaintiff.

51 GEORGE W. TALBOT *versus* JOHN CLARK.

A bill of exchange, which was indorsed by C of New Orleans, and was payable in Boston, was owned by T of New York. The bill was dishonored by non-acceptance August 11, and H, who was T's agent at Boston, wrote to T by mail the same day, informing him of the dishonor of the bill. T, by an answer dated August 13, requested H to give the notices. H accordingly had the notice to C put into the mail at Boston, August 19 *Held*, that the notice was not seasonable, even if T was justifiable in sending to H, instead of sending notice himself directly from New York to New Orleans.

It *seems*, that T was bound to send notice direct from New York to New Orleans.

In an action by the holder of a bill of exchange against an indorser, a subsequent indorser is not a competent witness to charge the defendant, without a release from the plaintiff.

The deposition of a witness was rejected at the trial, on the ground of interest, the plaintiff nonsuited, and the judge who tried the case refused to take off the nonsuit in order to give the plaintiff an opportunity to execute a release to the witness and have his deposition taken anew. It was *held*, that this was a proper matter for the discretion of the judge, and that his refusal was right.

It *seems*, that the plaintiff had no sufficient ground for the postponement of the trial or continuance of the action, even if his motion had been made before the nonsuit was ordered.

It is not necessary to object to the competency of a witness on the ground of interest, at the time when his deposition is taken; it is sufficient to make the objection at the trial.

THIS was assumpsit against the defendant as indorser of a bill of exchange drawn by one Fiske at New Orleans, in favor of the defendant, on one Parsons at Boston, at sixty days' sight. James Armour of New Orleans and C. N. Bancker of Philadelphia were also indorsers of the bill subsequently to the defendant.

At the trial, before *Parker* C. J., it was proved, that the bill was duly presented for acceptance by Stevenson, a notary, on August 11th, 1825, and then dishonored. Stevenson then handed the bill to Hammond, the plaintiff's agent in Boston, who said he would take care of the notices. Hammond on

[2] See *Talbot* v. *Clark*, *post*, 51.

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the same day wrote to the plaintiff at New York, by mail, stating the dishonor, and afterwards received answer by mail, dated August 13th, 1825, requesting that Hammond would cause notices of the dishonor to be given. Accordingly on the 19th of August, 1825, Stevenson, by request of Hammond, gave the notice by mail to the defendant, directed to New Orleans. The judge ruled that this notice was not in season, and ordered a nonsuit, with leave to move the Court to take it off.

The plaintiff then offered the deposition of Bancker, who 52
indorsed the bill to the plaintiff, in order to prove notice to the defendant. The deposition was objected to, on the ground that the witness was interested, it not appearing that he had been released by the plaintiff; and for this cause it was rejected by the judge, and the nonsuit was ordered to stand.

Some days after, the counsel for the plaintiff made a written motion to take off the nonsuit and for a postponement of the trial, in order that he might have time to prove the execution of a release, if any was made before the deposition was taken, or to have a release given and the deposition taken anew. The motion was accompanied by the affidavit of the plaintiff's counsel. The reasons stated in the motion are; — 1. That the rejection of the deposition was a surprise on the plaintiff's counsel, who supposed, from the authority of various decisions, that it would have been admitted; and that if the counsel had been aware that there was any doubt as to the admissibility of the evidence without a release, he would have been prepared to show a release prior to the taking of the deposition, or would have caused the witness to be released by the plaintiff and a new deposition to be taken: — 2. That the deposition being taken at such a distance from the plaintiff, that he could not conveniently release the witness prior to the taking of the deposition, connected with the counsel's confidence that the deposition was admissible without a release, was the reason that no release was obtained before the deposition was taken: — 3. That no objection on behalf of the defendant was made, on the ground of interest, when the deposition was taken; which the counsel for the plaintiff supposed necessary in order to support the objection at the trial: — 4. That Bancker, in his deposition, stated, that he considered himself discharged from his

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liability to the plaintiff as indorser, which statement the plaintiff considered as sufficient evidence of a release. The motion was overruled by the judge.

The nonsuit was to be taken off or to stand, according to the opinion of the Court.

March 4th.

Ward, for the plaintiff, in order to show that the notice to the defendant proved at the trial, was sufficient, cited *Colt* v. *Noble*, 5 Mass. R. 167; *Whitwell* v. *Johnson*, 17 Mass. R

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453; *Shed* v. *Brett*, 1 Pick. 401; *Hilton* v. *Shepard*, 6 East, 14; 2 Stark. Ev. 269, 257.

Bancker was not interested, for a judgment against Clark would not discharge him, until it was satisfied; and in case of a judgment against Bancker, he would still have his remedy over against Clark, which remedy over is equivalent to an indemnity, or not being interested. *Ridley* v. *Taylor*, 13 East, 175; 2 Stark. Ev. 299, 300. In an action by the indorsee against the drawer of a bill, a prior indorser is a competent witness to prove that the defendant promised to pay the bill after it became due, and this because he has a remedy over. *Stevens* v. *Lynch*, 2 Campb. 332. So the acceptor of a bill is a competent witness against the drawer, to prove that he had in his hands no effects of the drawer when the bill was drawn. *Staples* v. *Okines*, 1 Esp. R. 332; 2 Stark. Ev. 299. The makers and indorsers of notes have in various cases been held to be competent witnesses. *Skelding* v. *Warren*, 15 Johns. R. 270; *Woodhull* v. *Holmes*, 10 Johns. R. 231.

Even if Bancker was interested, it was too late to make the objection at the trial; it should have been made at the time when the deposition was taken. *Potter* v. *Leeds*, 1 Pick. 309; 2 Stark. Ev. 756.

The motion was not for a continuance, but merely for a *postponement*, which was reasonable, as there had been no laches in procuring the release, on the part of the plaintiff's counsel.

Smith, for the defendant, to show that the notice was not seasonable, cited some of the cases relied on for the plaintiff, and *Scott* v. *Lifford*, 9 East, 347; *Langdale* v. *Trimmer*, 15 East, 291; *Smith* v. *Mullett*, 2 Campb. 208; *Hussey* v. *Freeman*, 10 Mass. R. 84; *Whitwell* v. *Johnson*, 17 Mass.

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R. 449 ; Bayley on Bills (Phil. & Sewall's 1st edit.), 172. To show that Bancker as indorser was incompetent on the ground of interest, he cited *Barnes* v. *Ball*, 1 Mass. R. 73 · *Rice* v. *Stearns*, 3 Mass. R. 225 ; *Emerton* v. *Andrews*, 4 Mass. R. 653 ; *Martin* v. *Henrickson*, 2 Ld. Raym. 1007 ; *S. C.* 1 Salk. 287 ; *Steinmetz* v. *Currie*, 1 Dallas, 272 ; *Stille* v. *Lynch*, 2 Dallas, 194 ; *Respublica* v. *Ross*, 2 Dallas, 239 ; *Mann* v. *Swann*, 14 Johns. R. 270 ; *Cummings* v. *Fisher*, Anthon's N. P. Cas. 7 ; *Shaver* v. *Ehle*, 16 Johns. R. 201 ; *Herrick* v. *Whitney*, 15 Johns. R. 240 ; *Owen* v. *Mann*, 2 Day, 399. The cases of *Birt* v. *Kershaw*, 2 East, 458. and *Dickinson* v. *Prentice*, 4 Esp. 32, differ from the present. As to not making the objection to the competency of the witness at the time when the deposition was taken, before the magistrate taking it, he cited *Mifflin* v. *Bingham*, 1 Dallas, 275.

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PARKER C. J. delivered the opinion of the Court. We think it very clear that the notice proved to have been sent to the defendant by Stevenson the notary, was not early enough to hold the defendant as indorser. The bill was dishonored here on the 11th of August, 1825. Suppose the agent here, instead of causing notice to be given immediately, had done right, as he had no orders, in sending the bill to his principal in New York, the principal was then bound to give the notice himself in due season. There is no doubt, from the evidence, that he received news of the fate of the bill on its presentment to the drawee, on the 13th. He should have written from New York the next day ; instead of which, he sends the bill back to Boston, directing his agent here to cause notice to be given, and on the 19th the notary forwards the notice to New Orleans. The lapse of time between the 13th and 19th is not accounted for. Had the direction been sent to the post-office in New York on the 14th, as would be necessary in order to give seasonable notice, it must have reached Boston as early as the 16th or 17th at furthest ; why then postpone the notice until the 19th ? The law is entirely settled here, in England and in New York, that notice must be sent by the next day's mail after knowledge of the dishonor of a bill. There is laches then, either in the plaintiff in New

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York, or his agent in Boston, and it is immaterial which. Upon this evidence the defendant cannot be charged.[1]

But the plaintiff proposed to prove an earlier notice from New York, by the deposition of Bancker, who stood on the bill as the immediate indorser to the plaintiff, the defendant being payee and first indorser. This deposition was excluded on the objection that Bancker was interested in the event of the suit. Cases have been cited by the plaintiff's counsel to
55 show that an indorser is a competent witness; and there is no doubt that to some purposes and under some circumstances he is. The question turns altogether upon his interest, and not upon his character as a party to the bill. *Primâ facie* he would seem to be interested to fix the payment upon Clark, for thereby he will be discharged; and although a judgment against Clark without satisfaction will not release Bancker, yet the ability or inability of Clark to pay, we think cannot vary the question. There may be an attachment or security in some form, and if not, his insolvency is not to be presumed, and there is no evidence that it exists. It is suggested that the witness stands indifferent, but this is not so, Clark having no right of action against him. If the witness were a prior instead of a subsequent indorser, this argument would have some force. In our cases which have been cited, an indorser standing as this witness does has always been held to be incompetent.[1]

There is then a motion to take off the nonsuit, in order that the plaintiff may have opportunity to take a new deposition of Bancker, after giving him a release. This was a matter of discretion with the judge at the trial, and was referred to the whole Court, rather for their advice than because it was conceived to be a question of law. I did not recollect, nor does any one of the other judges, any instance of granting such a motion for such a purpose, after a nonsuit in the ordinary course of trial. We all think it would be productive of great mischief, to sanction such a practice, and that it may as well

[1] See *Church* v. *Barlow*, 9 Pick. 549; *U. S. Bank* v. *Barlow*, 5 Mason 366; *Ogden* v. *Dobbin*, 2 Hall, (New York,) 112; Bayley on Bills, (2d Am edit.) 267, 269.

[1] See Bayley on Bills, (2d Am. edit.) 595, and cases cited in notes.

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be done after a verdict as after a nonsuit so entered. The motion for continuance should be made upon the rejection of the evidence and before any disposition of the cause.

But the purpose for which the motion is made is not sufficient. It is, to qualify a witness by a release (generally formal between the parties), who at the trial was incompetent. A continuance, or even a postponement, for such a purpose, is not recollected; even before any disposition of the cause has taken place.

In this particular case there seemed to be no sufficien ground for indulgence. The objection was a general one in its nature, and must have been foreseen, and ought to have been provided against by other testimony or a release of this witness before his deposition was taken.

It has been urged that the objection to the witness might be considered as waived, because exception was not taken when the commission issued or when the witness was examined; but we think such has not been the practice, and that an objection in court when the deposition is offered, is seasonable. The case of *Potter* v. *Leeds*, cited in support of the plaintiff's position, is not similar. It was decided only, that all question as to the form of interrogatories should be made before the commission goes, to give the other party opportunity to vary his interrogatories. But objections to the competency of a witness should be made to the court at the trial.[1]

The nonsuit cannot be taken off.

[1] See Revised Stat. c. 94, § 26.

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THE NEW ENGLAND MARINE INSURANCE COMPANY *versus* JAMES DE WOLF Junior.

The rule, that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds, and not to simple contracts.

I. C., who was duly authorized by J. D. to guaranty two notes, wrote on one, "By authority from J. D. I hereby guaranty the payment of this note. I. C." ; and on the other, "By authority from J. D. in a letter dated September 24, 1824, [from which C. derived his authority,] I hereby guaranty his payment of the premium on policy No. 10079 [for which the note was given]. I. C." *Held*, that J. D. was bound as guarantor of the notes, and not I. C.

The letters from J. D. to I. C. and from I. C. to J. D. and from J. D. to the person whose notes were guarantied, and from him to J. D. and to I. C., written before and soon after the guarantics were made, and in relation thereto and to the transactions in which they originated, being part of the *res gestæ*, are admissible evidence in an action against J D. as guarantor of the notes.

The act incorporating an insurance company required all policies to be signed by the president. A policy of insurance, which provided that a loss should be payable to the assured or his assigns, was assigned, and the company's assent to the assignment signed by the secretary only, and the assignee guarantied the premium note, the company having refused to assent to the assignment without this guaranty. In an action against the guarantor of the note, *held*, 1. That the assent of the office to the assignment was a sufficient consideration for the guaranty, as without it an assignee, in case of loss, could sue only in the name of the assignor: 2. That the act of incorporation did not require the assent to the assignment to be signed by the president: 3. That the secretary's signature *primâ facie* bound the company, and that having accepted the guaranty, it had adopted the act of the secretary.

THIS was assumpsit against the defendant as guarantor of two promissory notes. The action was tried before *Parker* C. J.

57 A note for 1251 dollars was produced, dated November 27th, 1822, signed by George De Wolf for himself and John Smith, payable to the plaintiffs or order in eighteen months. This note was given for the premium of insurance on the ship Octavia and cargo, by a policy of that date. On the back of this note are the following words. "Boston, April 27, 1825. By authority from J. De Wolf junior, I hereby guaranty the payment of this note. Isaac Clap." The other note was for 526 dollars, dated July 12th, 1824, signed by George De Wolf, payable to the plaintiffs or order in nine months, and was given for the premium of insurance on the brig Arab and cargo by a policy of the same date. On this note are indorsed the

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following words. "By authority from J. De Wolf junior, in a letter dated Sept. 24, 1824, I hereby guaranty his payment of the premium on policy, No. 10079. Isaac Clap." George De Wolf and John Smith continued in good credit till December, 1825, when they failed, without having paid or been called on to pay these notes. In both cases the risks were taken by the plaintiffs and the premiums earned.

The defendant's counsel insisted that Isaac Clap was the only person bound by these guaranties, and objected to their being read to the jury; but the judge ruled that they were competent evidence to charge the defendant, provided Clap's authority to make them on behalf of the defendant was proved.

In order to prove this authority a number of letters were offered from the defendant to George De Wolf, from George De Wolf to the defendant, from George De Wolf to Clap, from Clap to the defendant, and from him to Clap, of various dates between September 1, 1824, and December 31, 1825. These letters tended to show the authority of Clap to guaranty the notes on behalf of the defendant, and also the assent of the defendant to the guaranty. The defendant's counsel objected to the admission of the correspondence, particularly to George De Wolf's letters to Clap and to the defendant, and insisted that Clap ought to be produced as a witness. But the judge admitted the whole of the correspondence. The plaintiffs likewise offered in evidence letters from the president of the insurance company to the defendant, demanding payment of the notes and the answers of the de- 58
fendant.

The plaintiffs' counsel likewise offered in evidence an instrument dated November 9, 1822, by which George De Wolf and John Smith assigned the ship Octavia and cargo, the brig Arab and cargo, and other property, to the defendant, as security for large advances made by him to them; and also divers policies of insurance on the assigned property, among which were the two policies for which the abovementioned premium notes were given, all of which policies were assigned to the defendant. All these documents, except the two policies made by the plaintiffs, were objected to by the defendant's counsel,

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as *res inter alios acta*, and therefore incompetent evidence The judge, however, admitted them.

The plaintiffs' counsel introduced witnesses, who testified that it was not customary to demand or compel payment of premium notes until after the termination of the risks insured against; and that the risks in the two policies for which the two notes in suit were given, had not terminated at the time of George De Wolf's failure; but it also appeared, that three premium notes given to the Suffolk Insurance Company had been demanded of and paid by George De Wolf in October, 1825, although the risks for which they were given had not then terminated.

The assent of the plaintiffs to the assignment of the policy on the Octavia was signed only by the secretary of the insurance company. The president of the Suffolk Insurance Company testified that it was customary for the secretaries of insurance companies to sign similar assents to assignments; but the president of the Boston Marine Insurance Company stated that the practice of that company was otherwise. But it was proved that small alterations are occasionally made in policies by the secretary, by direction of the president, without being signed at all.

The defendant's counsel further insisted, that as special authority had been given by the defendant to Clap, to guaranty certain notes particularly described in his letter of September 24, 1824, a general authority to guaranty other notes could not be presumed, and therefore that the guaranty of the note for
55 1251 dollars, being unauthorized, was not binding on the defendant: and also, that as the policy on the Octavia contained an engagement on the part of the plaintiffs, to pay any loss to the assured "*or their assigns*," the supposed promise of the defendant to guaranty the premium note was without consideration. From the correspondence above mentioned it appeared, that the plaintiffs had refused to assent to the assignment, unless a guaranty of the note was given by the assignee. The defendant's counsel also insisted, that as the assent of the plaintiffs was signed only by the secretary, it was not binding, and therefore there was no consideration for the guaranty; which was therefore void. In support of this objection he relied on

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the act incorporating the company, which requires all policies to be signed by the president.

The judge instructed the jury, that a contract to guaranty must be in writing, but that the authority of an agent to sign such contract might be proved by parol, or might be inferred from the acts of the principal, and that if done without such authority, yet, if it was made known to the principal and approved by him afterwards, such conduct would amount to a ratification on his part; and the contract would be as binding on him as if made by virtue of a previous authority; therefore, if they were of opinion, from the correspondence, that the defendant knew of the custom of the insurance offices to require of the assignee an agreement to pay the premium, before they would consent to an assignment of policies, and thus knowing it, insisted on having the assent of the plaintiffs obtained, and afterward accepted the policies; they might infer from the correspondence, that the defendant had either previously authorized Clap to give the guaranty, or had subsequently ratified it; and that the correspondence was legal evidence to prove such authority or ratification, if the jury thought it adequate: And that though the policy on the Octavia contained a promise to pay the loss to the assigns of the assured, yet any suit brought to recover the same must be in the name of the assured, and the plaintiffs would have a right, in such suit, to set off all premium notes due them by the assured; and their assent to a waiver of this right was a sufficient consideration for the defendant's guaranty. As to the assent of the plaintiffs being signed by the secretary only, the judge ruled that it was *primâ facie* evidence of their obligation to the defendant. 60

The jury having returned a verdict for the plaintiffs for the amount of both notes, the defendant moved for a new trial for the misdirection of the judge.

Curtis, for the defendant. The guaranties on both of the notes were in such a form, as to bind only Clap, and not the defendant. *Stackpole* v. *Arnold*, 11 Mass. R. 27; *Fowler* v. *Shearer*, 7 Mass. R. 14; *Elwell* v. *Shaw*, 16 Mass. R. 42; *Copeland* v. *Mercantile Insurance Company*, 6 Pick. 198; *Bacon* v. *Dubarry*, 1 Ld. Raym. 246; *Tippets* v. *Walker*, 4 Mass. R. 595. *March 6th*

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The letters of Clap to the defendant, and of George De Wolf to Clap and to the defendant, and of the defendant to George De Wolf, were improperly admitted in evidence. They were *res inter alios*. 2 Stark. Ev. 60, 61; *Langhorn* v. *Allnutt*, 4 Taunt. 511. For the same reason, the policies signed at other offices were improperly admitted.

The policy on the Octavia being payable to the assured or "*their assigns*," nothing is gained by the assignee from having the consent of the office to the assignment, and there was therefore no consideration for the guarantee. The form of policy since in use differs, in containing a clause making the policy void, in case of an assignment without assent.

An express authority having been given to guaranty some of the notes, an authority cannot be implied as to any other.

The plaintiffs never consented to the assignment, the signature of the secretary alone not being binding on them. Act incorporating the plaintiffs, 3 Spec. Laws of Mass. 151, § 5, 6.

The plaintiffs were guilty of laches in not calling on the defendant before the failure of George De Wolf; and this negligence discharges the defendant.

S. Hubbard and *W. J. Hubbard*, for the plaintiffs. The correspondence was properly admitted in evidence. *Sumner* v. *Williams*, 8 Mass. R. 214. It formed part of the *res gestæ*. The letters of the defendant being admissible, the letters to which they refer and are answers, must also be admissible. In *Whitehead* v. *Tucket*, 15 East, 400, the same objection to the evidence might have been made, but it was not,
61 being evidently considered untenable. It is clear from this correspondence, that Clap was sufficiently authorized to guaranty this note. Even if there was no authority, still Clap being the general agent of the defendant, and the defendant knowing that such a guaranty was necessary before the office would consent to the assignment, the defendant, by receiving the policies without objection, until called on to pay the notes, ratified the proceedings of Clap. *Andrews* v. *Kneeland*, 6 Cowen, 354. *Fenn* v. *Harrison*, 3 T. R. 757; *S. C.* 4 T. R. 177. The other policies were properly admitted in evidence, in order to show that Clap was the general agent of the defendant.

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The guaranties in their present form bound the defendant, and not Clap; it cannot be doubted that such was the intention of the parties. *Northampton Bank* v. *Pepoon*, 11 Mass. R. 292; *Long* v. *Colburn*, 11 Mass. R. 97.

The consideration for the guarantv was sufficient, for the assent of the office enabled the defendant to sue in his own name, which, without it, he could not have done. *Mowry* v. *Todd*, 12 Mass. R. 281.

The plaintiffs have been guilty of no laches. The guarantor of a note is not, like an indorser, entitled to notice of its non-payment. *Duval* v. *Trask*, 12 Mass. R. 154; Bayley on Bills, (Am. ed.) 186, note; *Allen* v. *Rightmere*, 20 Johns. R. 365; *Cobb* v. *Little*, 2 Greenl. 261; *Williams* v. *Granger*, 4 Day, 444.

The assent of the office signed by the secretary was sufficient. The presumption, *primâ facie*, is, that he was authorized; and the plaintiffs who bring this action cannot deny his authority. *United States Bank* v. *Dandridge*, 12 Wheat. 64.

PARKER C. J. delivered the opinion of the Court. With respect to the form of the guaranty, we are of opinion that the effect of it must be determined by the intention with which it was made. If Clap had authority to make the guaranty for the defendant, and the words are such as not clearly to bind himself alone, and it can be ascertained that he intended to act for De Wolf, the latter will be bound. The authorities cited to maintain the position, that the name of the principal must be signed by the agent, are of deeds only; instruments under seal; and it is not desirable that the rigid doctrine of the common law should be extended to mercantile transactions of this nature, which are usually managed with more attention to the substance than to the form of contracts.[1]

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Clap, in his guaranty, declares that he acts by authority of De Wolf, and it is evident, from all the circumstances of the case, that he professed to act only as his agent. The only question ought to be, therefore, whether he had such authority.

[1] See Story's Comm. on Agency, 143, 144, and cases cited; *Pentz* v. *Stanton*, 10 Wendell, 271; *Andrews* v. *Estes*, 2 Fairfield, 267; *Campbell* v. *Baker*, 2 Watts, 83; Chitty on Contracts, (4th Am. edit.) 184, 185, and note.

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Now it is perfectly clear from the letters of the defendant to Clap and to George De Wolf, that he intended to guaranty the premium upon the policies which were assigned to him He was informed distinctly that he could no otherwise obtain the consent of the underwriters to the assignment, and their promise to pay any loss to him. His repeated calls for all the policies, his express direction with respect to all but one, his frequent and pressing calls for that which was omitted from the list transmitted by Clap, knowing the only terms upon which he could obtain the policies in question with the promise of the office upon them, are clear and decisive evidence of an authority to Clap, and if that were doubtful, of a ratification, with a full knowledge of the means by which they had been obtained.

In regard to the admissibility of the letters of Clap and George De Wolf, we think there is no question. The whole correspondence relates to a mercantile contract between the defendant and his agents touching the very subject in controversy, the guaranty of premium notes. It is the transaction itself, the *res gestæ*. It is admitted that the letters of the defendant are good evidence ; then certainly those to which his are answers should have been received. Indeed, the only use of the letters was to prove that the defendant knew the conditions on which alone the office would substitute him on the policies. There is no declaration of the agents to bind the principal, but the communication of facts which coming to his knowledge are to be used in construction of his subsequent acts.

In regard to the form in which the substitution was made on the policies, being by the secretary only, we think it clear that this was *primâ facie* evidence of an obligation on the company.
63 It is to be presumed that the secretary acted under instructions of the president and directors, and the charter does not require the signature of the president to any instrument but the policy. If an action had been brought on this promise by the defendant, to recover a loss, the company could not have resisted payment, unless they could show an express prohibition upon the secretary to bind them in this way. Indeed, having received a consideration in the guaranty of the defend-

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ant, they have accepted the act of the secretary, and are bound by it.[1]

We think also, that the promise of the office to pay, in case of loss, to the defendant, is a sufficient consideration for the guaranty, notwithstanding in one of the policies they originally agreed to pay to the assured or their assigns; for the promise direct to him, on which an action could be maintained, is of itself a sufficient consideration.

Judgment according to verdict.

WILLIAM EMERSON *et al. versus* SAMUEL KNOWER.

In an indenture of assignment and release between a debtor and his creditors, the property assigned was described as a quantity of certain kinds of goods in the hands of divers persons named, and it was provided that a schedule of the property should be made out and annexed to the instrument "as soon as may be." *Held*, that annexing a schedule was not a condition precedent to the operation of the release; and that omitting to annex it did not make the assignment void or defeat the release; though the provision might amount to a covenant that the debtor would, whenever it should be required, make out and annex such schedule.

Where one partner signs a general release to a debtor of the firm, and it does not appear whether it is intended to apply to separate or to partnership demands, or that the subscribing partner has, on his separate account, any demand against the debtor, the release will be a discharge from debts due to the partnership.

If, in an action by the partners for their joint demand, such release is pleaded, and they propose to show that it was intended to apply only to the separate demand of the subscribing partner, they should reply, alleging this fact.

IN this action, the plaintiffs, who were copartners, declared on divers promissory notes made to them before November 10, 1825. The defendant pleaded a general release of that date, signed by Emerson, one of the plaintiffs. The plaintiff, after oyer, demurred generally.

The instrument of release was an indenture between the defendant, his creditors and John Lemist, whereby he assigned divers "quantities of leather and stock designed for the manufacture of boots and shoes, and also of boots and shoes already made, or partly made," in the hands of certain persons named, to Lemist in trust for the benefit of the creditors, parties to the indenture; and they, in consideration of the premi- 64

[1] See Revised Stat. c. 37, § 13, 29.

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ses, released all actions, claims and demands against the defendant. The release did not, on the face of it, purport to apply particularly to debts due to Emerson separately, or to those of the plaintiffs as partners; and it did not appear that the defendant, at the time of making the assignment, was indebted to Emerson separately.

The indenture contained a provision, that a schedule of the property should be made out and annexed "as soon as may be." No such schedule was annexed.

March 7th.

S. D. Parker, for the plaintiffs, cited, in reference to the position, that the release did not discharge the partnership debt, *Lyman* v. *Clark*, 9 Mass. R. 235; Watson on Partn. 226: *Nokes and Stokes* v. ———, 1 Ventr. 35; *Harrison* v. *Jackson*, 7 T. R. 207; *Clement* v. *Brush*, 3 Johns. Cas. 180. In some cases, where one partner expressly refers to a partnership debt, or where he is authorized by deed to sign for his partner, his release has been held to operate as a bar to the copartnership demand. *Pierson* v. *Hooker*, 3 Johns. R. 68; *Bruen* v. *Marquand*, 17 Johns. R. 58; *Bulkley* v. *Dayton*, 14 Johns. R. 387; *Henderson* v. *Wild*, 2 Campb. 561; *Salmon* v. *Davis*, 4 Binney, 375; *Hawkshaw* v. *Parkins*, 2 Swanst. 545.

The indenture is void by reason of the omission to annex the schedule, as this was part of the consideration for executing the instrument, and until it should be done, the instrument was not completed. *Cranley* v. *Hillary*, 2 Maule & Selw. 120; Chitty on Contr. 16, 272, 274; Montagu on Compositions, 29, 30, cites 1 Vern. 210; *Wiglesworth* v. *White*, 1 Stark. R. 218. Without such schedule the assignment was invalid for uncertainty. Com. Dig. *Grant*, *E* 14.

Morey, for the defendant, insisted that there was a sufficient specification of the property without any schedule.

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To show that a release by one partner was a release of the partnership demands, unless the contrary appeared in the instrument itself, he cited Co. Lit. 232 *a*, note 144; *Tuckerman* v. *Newhall*, 17 Mass. R. 584; *Tooker's case*, 2 Coke, 68; *Ruddock's case*, 6 Coke, 25; 18 Vin. Abr. 303, *Release*, *H*, note; Bac. Abr. *Release*, *I*, *K*.

As to the omission to annex the schedule, he cited *Stevens*

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v. *Bell*, 6 Mass. R. 339 ; *Hastings* v. *Baldwin*, 17 Mass. R. 552.

PARKER C. J. delivered the opinion of the Court. It is objected to the indenture, first, that it is incomplete and therefore void, because no schedule has been annexed, as is provided for in the instrument. But the conveyance is absolute, of all the property described in the hands of the several persons whose names are mentioned. The annexation of a schedule is not a condition on which the validity of the assignment is to depend. The property passed, and was intended to pass, before any schedule should be taken. The assignee had power, after the execution, to demand the property of all those in whose hands it had been placed, and though a schedule might be convenient, it was by no means essential to the contract, the property, and the place where it was to be found, being specifically mentioned in the body of the indenture. The qualification of the provision in regard to the schedule, that it was to be made out and annexed *as soon as may be*, proves that it was not considered by the parties as affecting the validity of the assignment. It was for the convenience of the assignee and the creditors, and perhaps amounts to a covenant on the part of the defendant that he would, whenever it should be required, make this annexation to the indenture. Surely he cannot avoid his assignment for having omitted to do it, and the creditors who became parties, having taken the property by virtue of the assignment, cannot avoid their release for this omission. It appears by an authority cited (Montagu on Composition, &c.), that if the debtor omits to do any thing which he stipulates, the release of the creditors shall not avail him ; but this principle applies only when the thing omitted is substantial, and is in truth a fraudulent violation of his contract.

The second objection is, that the release is signed and sealed by Emerson alone ; whence it is insisted, that it operates only upon such debts as were due to him alone, and not on those which were due to Emerson and his partner, and therefore that the demands sued in this action were not released. 66

It being clear that one partner, or joint creditor, may release the whole debt, it is very certain that the act of Emerson in regard to this indenture ought to bar the present action, if it

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was his intention to discharge the partnership demands. It may be, that if the intention were otherwise, it would not have that effect ; though by some of the authorities cited it would seem that a release by one will discharge the joint claim, unless its operation be restricted by some express words in the release. But however this may be, we think that by an instrument like the one in question, which is made for the benefit of the creditor as well as of the debtor, and where those who sign are described as being creditors, the presumption is, that those who sign, mean to take the benefit for all their demands, and that the release should be co-extensive with the advantage. If it appeared by the indenture, or by any schedule of creditors annexed, that Emerson had a private demand separate from his partnership debt, perhaps the presumption would be the other way ; but we see nothing in the instrument, from which it can be inferred that Emerson had any other than a joint claim. If the fact were so, it should have been made to appear in a replication to the plea, and then the question could be more distinctly settled as to the operation of this release.

As the case now stands, we are satisfied that the execution of the release by Emerson must be taken to be a release of all the demands of himself and partner, for otherwise there is nothing on which the release can operate, it not appearing that he had any private demands of his own.[1]

[1] See Chitty on Contracts, (4th Am. edit.) 604, and cases cited ; *Rice* v. *Woods*, 21 Pick. 34 ; 3 Kent, (3d edit.) 48, 49 ; *Halsey* v. *Whitney*, 4 Mason 206, 232 ; *Smith* v. *Stone*, 4 Gill & Johns. 310.

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PRINCE HAWES *et al. versus* SAMUEL LANGTON and Trustees.

In a trustee process, no evidence can be admitted to charge the trustee, except what he discloses in his answers.

In such a process the trustee is not obliged to disclose communications made to him by other persons, though it seems he may disclose them in his answers, if he is satisfied of their truth.

Where a person summoned as trustee, disclosed an assignment to himself by the defendant, of property for the benefit of creditors, apparently valid; and the defendant made an affidavit of facts tending to show the assignment fraudulent, and the trustee refused to annex the affidavit to his answers, expressing his disbelief of the facts stated in the affidavit, the court refused to order the trustee to annex the affidavit to his answers.

It *seems*, that where a debtor is summoned as trustee of his creditor, the court can not compel him to disclose an assignment of the debt to a third person, where the trustee does not personally know the fact of the assignment.

If the assignee should be injured by the trustee's refusing to state the assignment in his answers, it *seems* that he would have a remedy by an action against the trustee.

Where an assignee of the defendant's property for the benefit of creditors is summoned as trustee, the plaintiff is not, under *St.* 1817, *c.* 148, entitled to a trial by jury to try the validity of the assignment.

ELIJAH LORING and Washington Munroe were summoned as trustees in this case. The answer of Loring sets forth an indenture of assignment, dated January 5, 1828, by which Langton assigned his property to Loring and Munroe, for the benefit of Munroe, to whom he was indebted, and other creditors. In a schedule of borrowed money annexed to the indenture was enumerated a note to Munroe for 6161 dollars 13 cents, and in another schedule another note to him for 656 dollars 35 cents. He also states, that on the 8th of January, 1828, Langton came to his (Loring's) counting-room, and stated to him for the first time, that the sum of 1000 dollars was included in one of the demands of Munroe over and above his genuine demands, and this he wished struck from the list of claims, as it was intended to be reserved for his benefit. On the same day, with Munroe's consent, the amount of 1000 dollars was struck off, and a memorandum was written at the foot of the schedule, signed by Langton, Loring and Munroe, stating that it was an error, and therefore deducted. The note for 656 dollars 35 cents was also struck from the other sched-

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ule, and a similar memorandum made. On January 12, 1828, Munroe assigned his property to William Dehon and Loring, for the benefit of his creditors, including his claims against Langton, and the share which he was to receive of Langton's effects, and by the same instrument he conveyed to Loring all his interest as trustee in the property assigned by Langton, so as to constitute Loring sole trustee of Langton's property

The answers of Munroe confirmed the statements of Loring. He also stated, that at the time when he consented to have the 1000 dollars struck off, he had not examined his papers, and for the moment supposed Langton to be correct in his statement, in relation to the supposed reservation of 1000 dollars; but that on inspection of his papers soon after, he ascertained that Langton was under an entire mistake in relation to the supposed reservation, and that the sum of 1000 dollars ought not to have been struck off. Munroe also stated the items out of which the sum mentioned in the note was composed, which tended to show that the full amount was due to him. Munroe also claimed to have the 1000 dollars restored to the schedule.

The note for 656 dollars 35 cents was included in a check for a larger amount.

Langton having made an affidavit relative to the indenture, and tending to invalidate it by showing a reservation of 1000 dollars for his benefit, which affidavit was sent to Loring, an interrogatory was filed on behalf of the plaintiffs, requesting Loring to annex the affidavit to his answer. This he declined doing, because, as he says, "he has not such confidence in the statements of Langton as to be willing to make them a part of his answer, and because he thinks he has reason to believe the statements of Langton heretofore made relative to said transactions, either through forgetfulness or otherwise, have been so grossly erroneous that they might be calculated to mislead the Court, and finally because he is advised by his counsel they are not proper to be introduced."

A motion was made by the plaintiffs, that the trustee should be ordered by the Court to annex the affidavit of Langton tc his answers.

March 9th. *S. Hubbard* and *C. G. Loring*, for the plaintiffs, contended

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that the trustee was bound to annex Langton's affidavit to his answer. The trustee's answer being the only evidence admissible, hearsay evidence may from necessity be introduced into it, which would not be proper if other witnesses were allowed to testify. If such evidence is not admissible, great injustice and hardship must be the consequence. In many cases, evidence has been introduced besides facts known to the trustee. Thus books of a third person have been made evidence by a trustee's answer. *Cleveland* v. *Clap*, 5 Mass. R. 201. So a certificate of a referee, not summoned as a trustee. *Thorndike* v. *De Wolf*, 6 Pick. 120. In case of an assignment of a debt, the assignee of the debt may insist that the debtor, when summoned as trustee, shall make the assignment a part of his answer. *Foster* v. *Sinkler*, 4 Mass. R. 450. And in several cases the Court have said, that persons who could not themselves be chargeable as trustees, might yet be summoned, in order from their answers to charge other persons also summoned as trustees. *Fisk* v. *Herrick*, 6 Mass. R. 271 ; *Cleveland* v. *Clap*, 5 Mass. R. 201 ; *Lane* v. *Penniman*, 4 Mass. R. 91 ; *Penniman* v. *Ruggles*, 6 Mass. R. 166.

The plaintiff also claimed the right to try the validity of the assignment before a jury, under *St.* 1817, *c.* 148.

Fletcher, *Rand* and *Cooke*, for the trustee. It is well settled that the trustee is to be charged by his answers alone, and no other evidence is admissible. *Comstock* v. *Farnum*, 2 Mass. R. 96 ; *Barker* v. *Taber*, 4 Mass. R. 81 ; *Stackpole* v. *Newman*, 4 Mass. R. 85 ; *Hatch* v. *Smith*, 5 Mass. R. 49. If the trustee answers falsely, the only remedy is by a suit against him as provided by the statute. *St.* 1794, *c.* 65, § 9 ; *Whitman* v. *Hunt*, 4 Mass. R. 272. The case of *Minchin* v. *Moore*, 11 Mass. R. 90, is precisely parallel to the present. There the affidavit of the defendant having come up in the case, the Court refused to take any notice of it, but charged the trustee without any regard to it. The present case is even stronger, for the attempt here is to charge the trustee in opposition to his answers, by evidence which he declares he does not believe.

The case is clearly not one in which a jury trial can be had,

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for the statute only provides for the case of an assignment to *another*, not to the trustee himself.

PARKER C. J. delivered the opinion of the Court. We think it very clear, that the person summoned is not obliged to disclose any facts, which may be communicated to him by others, of which he has no personal knowledge; and that the Court cannot, on the question whether he shall be discharged or not, take into consideration any evidence, which is not verified by the oath of the trustee, and so made part of his answer. This point was settled in *Comstock* v. *Farnum*, 2 Mass. R. 96, the earliest case reported after the enactment of our trustee law; and we think the principle has been strictly adhered to in every case which has since arisen upon that law, as will be seen by all the cases cited in the argument. We do not think the principle trenched upon by those cases, in which the trustee has annexed assignments to his answer, and made them part of his disclosure; for, in such case, they are incorporated with his answer, and become part of his disclosure.

It is supposed that those cases, in which it has been intimated by the Court that a third party ought to be summoned as trustee, prove, that the Court will adjudge the person summoned, to be a trustee, upon facts collaterally shown by the disclosures of other persons. This intimation, though several times made, does not appear to have been carried into practice; and we do not think the position contended for necessarily follows. In the case of *Fisk* v. *Herrick*, the persons summoned as trustees owed nothing to Herrick alone, but were indebted to Herrick & Smith as partners. The Court determined, that they could not be charged as trustees of Herrick alone, for he might be indebted to the firm, and so have no equitable interest in the debt; but stated that one of the partners should be summoned as trustee, in order to ascertain the state of the concern, and if it should appear on his examination, that the principal has an interest in the partnership effects after all their debts are paid, that interest may be considered as effects or credits of the principal, and may be secured by the attachment. In what mode this is to be done, is not stated; nor has any case occurred in which this principle has been tested. It may be observed, however, that if the debtor to the partnership should.

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on such auxiliary disclosure, be charged, it would be altogether on his own answers; for he has acknowledged himself a debtor to the firm, and *primâ facie*, the principal has an interest in that debt, and it is only to protect his partners, that the Court refuse to charge the trustee without knowledge of the state of the partnership funds. The liability of the trustee is, in such case, derived altogether from his own indebtedness, as admitted by himself; so that this principle will by no means justify the introduction of evidence to contradict the disclosure of the trustee, which is the object of the motion before us. The case of *Penniman* v. *Ruggles, and Jutau, Trustee*, does not even advance this principle. Jutau had received goods as auctioneer from an officer, who had attached them as belonging to the principal, the attachment being supposed to be dissolved by an agreement entered into between the attaching creditor, the debtor and the officer. It was determined that the auctioneer was accountable only to the officer, and that the officer was the proper person to be summoned as trustee. It is not stated, that upon the disclosure of the officer, Jutau might be charged; but if it was so intended, we presume it would only be in the way suggested in the case, that is, that the answers of Jutau should have been sufficient to charge him, either originally, or by such further disclosures as he might be enabled to make with the aid of the disclosure of the officer. There is nothing in these cases tending to show, that the person summoned can be charged as trustee, on facts derived from any other source than his own answers, or that he can be compelled to state any fact which he disbelieves or does not know of his own knowledge.

Extrinsic facts have been sometimes introduced by the voluntary annexation of the evidence of them to the answers of the trustee, he declaring upon oath, that he believes them to be true; and it is in this way, that debts assigned were protected from attachment. But if the trustee should refuse to annex such evidence, we think there is no power in the Court to compel him. If an assignee should lose his debt on account of such refusal, the remedy is by action against the trustee. He may exercise his judgment and abide by the consequences.

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The object of this motion is, to compel the trustee to disclose a statement of the principal, which, if true, is supposed to defeat the title, under which he holds the goods by an assignment from the principal himself. If he does not believe this statement to be true, he ought not to make it a part of his answer. If he did, and at the same time stated his disbelief of its truth, it would be wholly nugatory; for he must be discharged or charged upon his own oath.

We think it also clear, that the case is not within the statute which provides for a trial of the validity of assignments by jury. He does not disclose an assignment to another, but to himself. The trustees, in this respect, are as one, being joint assignees. And, in regard to the suggestion of a sub-assignment to Dehon, that, upon the explanation given, has no relation to the case; for Dehon has not become the assignee of the principal and the trustee of his creditors. Every part of the statute indicates the intention of the legislature to provide for the bringing in of new parties whose rights cannot be otherwise protected. The assignees are already parties of record, and the creditors whom they represent are heard and protected through them. We cannot stretch the act to cover this case; for the very process, by which we should attempt to execute it, would exhibit an absurdity, being to compel those to come in, who were originally parties to the suit. As the legislature go step by step in reforming our jurisprudence, it is probable that the next step will be, to provide a remedy for such evils as are supposed to exist in the present case.[1]

Trustee discharged.

[1] See Revised Stat. *c.* 109, §§ 15 to 18; *Kelly* v. *Bowman*, 12 Pick 386 *Willard* v. *Sturtevant*, 7 Pick. 194.

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WILLIAM C. HOLLY *versus* HENRY H. HUGGEFORD.

If goods consigned to a commission merchant for sale, and on which he has a lien for a balance due to him from the owner, are attached as the property of the factor, the owner of the goods may maintain trespass against the officer who made the attachment.

The lien of the factor is a personal privilege, and cannot be set up by any other person in defence of an action by the principal.

A commission merchant, who had sold an article consigned to him, afterwards purchased it back at a reduced price on his own account, but it proving defective, the original owner who had made the consignment agreed to take it back, and it was accordingly charged to him in account by the factor, though it still remained in the factor's possession, without any other act done to revest the property. *Held*, that the property was revested in the original owner, who might maintain trespass against any wrong-doer who took the article from the possession of the factor.

If A's personal property is attached in a suit against B, and A sells and assigns his property to a third person while it is under attachment, an action of trespass for the benefit of the vendee, against the attaching officer, is properly brought in the name of A.

THIS was an action of trespass for taking certain chain cables, the property of the plaintiff. The defendant pleaded, that as a deputy sheriff, he attached the cables as the property of Thomas J. & Ebenezer Lobdell, at the suit of Levi Haskell, October 17th, 1826. He also pleaded the general issue.

At the trial, before *Parker* C. J., the plaintiff read the deposition of Thomas J. Lobdell, who testified that the cables were consigned to him as a commission merchant, for sale, by the plaintiff, during the years 1825 and 1826; that he, Lobdell, in the summer or autumn of 1826, having undertaken to raise a vessel which had been sunk, took the chain cables without Holly's knowledge or assent, to use in the undertaking, intending to restore them in good order, and that they were attached by the defendant while they were on board the vessel for this purpose; that in August, 1826, he (Lobdell) stopped payment; that at that time he made out his account against the plaintiff, charging him with various acceptances, which made an apparent balance due from the plaintiff to Lobdell, but that he has never paid his acceptances; that at the time of the attachment, if his acceptances had been paid, the plaintiff would have owed him 282 dollars 55 cents; that some of the acceptances were still outstanding, having never been paid by himself or Holly.

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Lobdell also testified, that the largest chain mentioned in the declaration, had been sold by him to Cutler & Hammond and John Benson, and after it had been used and a part of it lost, he had purchased it back of Cutler & Hammond, on his own account, at a reduced price; that subsequently, in June or July, 1826, he had the cable tried by a proving machine and found it very defective; that shortly after, he saw Holly at New York and told him that he had charged the chain back to him as bad, and Holly assented that he should so do; that Holly had previously given him instructions to take back all defective chains; that he accordingly charged the chain back to Holly, which appeared in the account rendered in August.

John Hall, a witness for the plaintiff, deposed, that on January 4th, 1827, Holly assigned and sold the chains in question to Hinton & Moore, for a valuable consideration, with authority to use all lawful means in Holly's name to obtain possession of them from the defendant.

The defendant produced a bill of sale, by which it appeared that the large chain was sold to Cutler & Hammond, June 6, 1826, and repurchased by Lobdell on the same day at a reduced price; and the balance settled by a note of Cutler & Hammond at sixty days; which it was proved was paid when it became due.

The counsel for the defendant contended, that the plaintiff had misconceived his action; that Lobdell, being a commission merchant, had a lien upon the chain cables to secure his general balance, and therefore as Holly had not a right to the present possession of the chains, although the general property might be in him, his remedy was *case*, and not *trespass*: Also, that as Holly had transferred his interest in the chains before the bringing of this action, it could not be maintained in his name: And that the property of the large chain was in Lobdell, being vested in him by the repurchase, and that there was no evidence of any transfer to Holly after the repurchase.

The judge directed the jury, that if the general property in the chains was in Holly at the time of bringing the action, he might maintain trespass against the defendant, notwithstanding any lien which Lobdell might have had upon them for his general balance against Holly: And that the transfer of Holly's

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interest after the taking, would not prevent the suit from being maintained in his name.

The judge also instructed the jury, that as to the large chain repurchased of Cutler & Hammond, the ceremony of a sale and delivery was not necessary to revest the property in Holly, but that charging it back in his account by Lobdell, with the consent of Holly, was sufficient for that purpose.

The jury having found a verdict for the plaintiff for the value of all the chains, the defendant moved for a new trial on account of the above directions to the jury, and because the verdict as to the large chain was against evidence.

March 11th.

H. H. Fuller, for the defendant. 1. The plaintiff, at the time of the taking, had not the actual possession of the chains, nor even a constructive possession, which was prevented by Lobdell's lien upon them; and therefore cannot maintain trespass. 1 Chit. Pl. 166, 167; Com. Dig. *Trespass*, *B* 4; *Smith* v. *Miller*, 1 T. R. 480; *Ward* v. *Macauley*, 4 T. R. 489; *Gordon* v. *Harper*, 7 T. R. 9; 3 Stark. Ev. 1438, 1439; *Walcot* v *Pomeroy*, 2 Pick. 121; *Putnam* v. *Wyley*, 8 Johns. R. 337; *Van Brunt* v. *Schenck*, 11 Johns. R. 377; 1 Com. Contr. 267.

2. Holly, having assigned to Hinton & Moore, had no interest left in the property, and therefore cannot maintain the action. No delivery was necessary to pass his interest in the property to them, as he had not the right of present possession in consequence of Lobdell's lien. Long on Sales, 162, 165, 166, 170; *Haskell* v. *Greely*, 3 Greenl. 425; *Zwinger* v. *Samuda*, 7 Taunt. 265; *Harman* v. *Anderson*, 2 Campb. 243; *Portland Bank* v. *Stacey*, 4 Mass. R. 661; *Jewett* v. *Warren*, 12 Mass. R. 300; *Putnam* v. *Dutch*, 8 Mass. R. 287.

3. The verdict as to the large chain is against evidence.

Shaw and *Bartlett*, for the plaintiff, contended that trespass was the proper form of action, and cited Hammond's N. P. 219; *Walcot* v. *Pomeroy*, 2 Pick. 121; *Brownell* v. *Manchester*, 1 Pick. 234; *Stevens* v. *Briggs*, 5 Pick. 177; *Gordon* v. *Harper*, 7 T. R. 9. Lobdell could have no lien for acceptances which were dishonored; and if he had any lien, he forfeited it by abusing his trust in making use of the chains.

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Jarvis v. *Rogers*, 15 Mass. R. 396; *Kinder* v. *Shaw*, 2 Mass. R. 398; Hamm. N. P. 233, 234. Besides, Lobdell does not claim any lien, and if he waives it, the defendant cannot set it up. *Meecker* v. *Wilson*, 1 Gallison, 425; *Jones* v. *Sinclair*, 2 New Hamp. R. 319.

The assignment of Holly to Hinton & Moore, conveying a mere chose in action, the suit was properly brought in his name.

March 23d. PARKER C. J. delivered the opinion of the Court. The principal objection to the verdict in this case arises from the supposed lien which Lobdell, the debtor, had on the goods attached, as the factor to whom they were sent to be sold on commission, he having accepted draughts drawn by Holly, the plaintiff, the balance at the time of the attachment being in his favor.

It was argued that this lien so destroyed the right of possession in Holly, that he cannot maintain trespass against the sheriff who made the attachment. We think this objection is not supported. It is true that the plaintiff must be in possession of the goods at the time of the injury, in order to maintain this action, for it is a remedy for an injury done to the possession. But by the authorities, general property in the goods carries with it constructively the possession, unless by some act of the owner he has so parted with the possession that at the time of the injury he has no right to reclaim it; as if, by contract, he had given the use and possession of the goods for a specified time, during which that injury occurs; which may happen in the case of a lease of a house with the furniture in it, or of a store with the goods in it, or of a manufactory with the machinery.[1] But the lien of a factor does not dispossess the owner, until the right is exerted by the factor. It is a privilege which he may avail himself of or not, as he pleases. It continues only while the factor himself has the possession, and therefore if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost,[2] and the owner may trace and recover

[1] See 1 Chitty on Pl. (7th Am. edit.) 194, 195.

[2] See Story's Comm. on Agency, 378 *et seq.* and cases cited.

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them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued notwithstanding the lien. None but the factor himself can set up this privilege against the owner. It is a personal privilege of the factor, and cannot be transferred; nor can the question upon it arise between any but the principal and factor. *Jones* v. *Sinclair*, 2 New Hamp. R. 321; *Daubigny* v. *Duval*, 5 T. R. 606.[1]

Holly v. Huggeford.

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The next objection is, that the property in the large chain, having vested in Lobdell by his purchase from Cutler & Hammond, to whom it had been sold by him, could not be divested out by some formal act of transfer from him to Holly; of which, it is said, there was no evidence. But we think, on this point, the case is clearly made out for the plaintiff. By the original authority given to Lobdell to sell, it was agreed, that in case the cables should prove defective, they should be returned. Now the large cable proved to be defective. The plaintiff was notified of it and agreed to take it back, and it was on Lobdell's books charged back to Holly, before the attachment. This was quite sufficient to revest the property in Holly, and Lobdell being his agent and factor, there was no need of a formal act of delivery, for the possession of the factor is the possession of the principal.[2]

The last objection is founded on the assignment of his interest in this property by Holly, after the attachment, but before this action was commenced; from which it is inferred by the counsel for the defendant, that Holly had no property remaining, and therefore has no right to recover.

The property at the time of that assignment was in the custody of the law under attachment. The plaintiff's right was in action only, and that he could not sell so as to enable the vendee to sustain an action. He had a right to carry on the suit in his own name for the benefit of his vendee, and the defendant cannot object to his want of title on this ground.[3]

Judgment according to verdict.

[1] See Story's Comm. on Agency, 384.

[2] Where parties agree to rescind a sale once made and perfected, without fraud, the same formalities of delivery, &c. are necessary to revest the property in the original vendor, which were necessary to pass it from him to the vendee. *Quincy* v. *Tilton*, 5 Greenleaf, 277.

[3] See 1 U. S. Digest, 247, Assignment, III. The Court will protect the

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DAVID WILLIAMS *versus* DAVID WOODMAN.

An indenture whereby a party agrees to furnish money for the purpose of "carrying on the general business of brokerage, embracing, as time and opportunity shall give, the *vending of lottery tickets*," is illegal on the face of it.

Where in an action of covenant broken, on such indenture, the defendant, after oyer, pleaded that the object and intent of the indenture was the buying and selling of lottery tickets, against the form of the statute, and issue was taken thereon, it was *held*, that evidence to prove that the plaintiff did, subsequently to the contract, buy and sell lottery tickets, was pertinent to the issue and properly admitted.

Held, that after a verdict for the defendant on such issue, the plaintiff could not object that the plea attempted to put in issue before a jury the construction of a sealed contract, but that such objection should have been taken by demurrer

THIS was an action of *covenant broken*. The contract was an indenture made between these parties, whereby the defendant agreed to furnish 2000 dollars, for the purpose of "carrying on the general business of brokerage in Boston, embracing, as time and opportunity shall give, the vending and selling of lottery tickets." The defendant pleaded;—1. *Non est factum*;—2. After oyer of the indenture, "that the object and intention of the writing obligatory and the covenants therein contained, and the money therein covenanted to be paid, were the buying and selling of lottery tickets, against the form of the statute," &c. Issues were joined on these pleas.

At the trial, the defendant, to support his second plea, offered evidence to prove, that after the execution of the indenture the plaintiff did buy and sell lottery tickets in the shop occupied by him. To this evidence the plaintiff objected, because it related to matter posterior to the execution of the indenture, and also, because the object of the indenture could not be proved by parol evidence; but it was admitted.

The jury found a verdict for the plaintiff on the first issue; and for the defendant, on the second.

The plaintiff moved for a new trial, on the ground that the evidence ought not to have been admitted. He likewise ex-

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right of the vendee to sue in such case, even against the vendor, in whose name the suit is brought; so that the vendor cannot discharge the suit when brought by the vendee, or defeat it by his admissions or his testimony. *Matthews* v. *Haughton*, 1 Fairfield, 420; *Hacket* v. *Martin*, 8 Greenleaf, 77, *Frear* v *Evertson*, 20 Johns. R. 142; *Titcomb* v. *Thomas*, 5 Greenleaf, 284.

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cepted to the defendant's second plea, as bad in substance, because it attempts to put in issue to the jury the construction and intent of a sealed contract. Williams v. Woodman.

T. Fuller, for the plaintiff, cited *Harmer* v. *Rowe*, 2 Chit. Rep. 334 ; *Milbourn* v. *Ewart*, 5 T. R. 381 ; *Holman* v. *Jackson*, Cowp. 343. 79 *March* 13th.

A. W. Fuller, *contrà*, cited *Collins* v. *Blantern*, 2 Wils. 341 ; *Lightfoot* v. *Tenant*, 1 Bos. & Pul. 551 ; *Huggins* v. *Bambridge*, Willes, 241.

Per Curiam. Joining issue was a waiver of any objection to the second plea for want of form ; and we are of opinion that the plea is sufficient in substance. The indenture, on the face of it, is void.[1] *March* 23d.

Issue having been taken on the object and intent of the covenant, the evidence admitted was pertinent to the issue. Acts done under the contract were proper evidence to show that the intent was illegal.

Judgment according to verdict.

[1] See Chitty on Contr. (4th Am. edit.) 536c, *et seq.* and notes.

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LEWIS GROSVENOR *versus* JONAS E. STONE.

The defendant, a merchant in this country, directs the plaintiff, his correspondent in England, to purchase goods and to draw for the price on a banker in London; who also authorizes the plaintiff to draw. The plaintiff, having similar orders from other persons, purchases goods in his own name for them and for the defendant indiscriminately. On the 30th of July he draws a bill in his own name at three months, payable on account of the defendant. The bill is drawn on account generally, in payment for several parcels of goods, and not in payment for goods purchased for the defendant; the defendant however being indebted to the plaintiff to the amount of the bill for goods already sent to him. The banker accepts the bill, having then in his hands only a small balance due to the defendant, but in September he receives funds beyond the amount of the bill. A few days before the 2d of November, when the bill falls due, the acceptor becomes a bankrupt. On the 26th of November a stranger, through mistake, pays the bill for the honor of a person not a party, claiming however to hold the plaintiff and all the other parties, but no notice of the dishonor is given to the plaintiff. Afterwards the person who paid the bill recovers judgment against the plaintiff upon a default by consent. In an action by the plaintiff against the defendant to recover the price of the goods, it was *held*, that the plaintiff, having had reason to expect that the bill would be paid by the drawee, was entitled to notice of its dishonor; that he could not waive notice to the prejudice of the defendant; and that the action could not be maintained.

ASSUMPSIT against the surviving partner of the house of Stone & Kent, for goods sold and delivered, money had and received, and money paid.

80 At the trial, before *Wilde* J., the plaintiff proved, that in 1825 he was a commission merchant residing at Manchester, England, and that his business consisted principally in executing orders sent to him from the United States, for British manufactures. Those orders he executed by purchasing goods in his own name, and upon his own credit, or from goods already on hand, purchased by him as bargains offered in the market, and charging the same to the persons who had sent the orders, at the cost together with a commission and interest. The parties whose orders were thus executed, placed their funds in the hands of some banker in London; the plaintiff drew for his re-imbursement, in his own name, and at three months from date, bills upon the bankers, payable out of the funds of such parties.

In 1824 and 1825 the house of Stone & Kent transmitted various orders for goods to the plaintiff, with authority to draw on Samuel Williams of London for the amount, and the plain-

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tiff purchased, made up and transmitted the amount of goods ordered, in the manner before stated, and drew bills on Williams for nearly the whole amount so purchased for the defendant and of the commissions thereon; it being expressed in the bills, that they were drawn on account of Stone & Kent. One of the bills thus drawn, dated July 30, 1825, payable to Broadhurst, Hanson & Co. of Manchester, in three months, on account of Stone & Kent, was accepted by Williams on the 2d of August, but before the 2d of November, when it became due, Williams had become a bankrupt, viz. on the 25th of October, and it was protested for non-payment.

At the time when this bill was drawn, Stone & Kent had a balance of about 50*l.* in the hands of Williams, and Williams had likewise placed to their credit a remittance of a bill for 1500*l.*, which became due and was paid to Williams on the 17th of September, 1825; and in a letter from Williams to Stone & Kent, dated August 5, 1825, he says he had authorized Grosvenor to draw on him previous to the receipt of the above 1500*l.*

On the 13th of October a balance of 463*l.* then due from Williams to Stone & Kent, beyond the amount of his acceptances, was transferred to the credit of Draper & Stone.

On the 26th of November the bill drawn by Grosvenor was 81
paid by Timothy Wiggin of London, and on the 9th of June following, Wiggin declared before the notary who made the protest, that on the 26th of November he paid the bill for the honor of Draper & Stone, under a belief that they had assumed the business and concerns of Stone & Kent; holding nevertheless Draper & Stone, and Stone & Kent, together with the drawer and acceptor of the bill and all others concerned, obliged to him for his re-imbursement. The plaintiff proved that the bill was drawn by him in part-payment for several parcels of goods, namely, on account generally, and not in payment for goods purchased by him for Stone & Kent. It appeared however, that the plaintiff had a claim against Stone & Kent to more than the amount of the bill, for goods which he had already sent to them.

The only notice of the non-payment and protest was contained in the deposition of Broadhurst, who testified that he

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Grosvenor v. Stone.

and his partners gave notice to Stone & Kent, of the non payment of the bill, by a letter dated Manchester, November 12, 1825, which was in the case.

The plaintiff gave in evidence also a judgment recovered by Wiggin, at the October term of the Common Pleas in this county, in 1827, against him (Grosvenor) as principal defendant, and Stone as his trustee. The defendant proved that this judgment was procured by the assent of Grosvenor; that a writ of *scire facias* upon the judgment was pending against Stone, as trustee, in which he denies that he is a trustee; that Wiggin procured Grosvenor to assign to him his claims against Stone & Kent, and to permit any suits to be brought against him on the bill and against Stone & Kent as his trustees, and in such suits not to require of Wiggin any formal proofs of his demand; and that thereupon Wiggin covenanted not to levy any judgment obtained in such suits, upon the person or property of Grosvenor, and to hold him harmless therefrom, and from or on account of the bill.

The plaintiff then proved that he became insolvent in August, 1825, and that two bills drawn by him after the bill in question, in the same manner, upon Williams, payable out of Stone & Kent's funds, which bills were protested for non-

82 payment by Williams, were, after the statement of an account on March 9, 1826, between Williams and Stone & Kent, taken up and settled by Stone & Kent.

Upon this evidence a nonsuit was directed, subject to the opinion of the whole Court.

March 13th. ***Shaw*** and ***Bartlett***, for the plaintiff. The bill of exchange is signed by Grosvenor for himself, and not as agent of Stone & Kent; so that Wiggin cannot resort to the defendant except indirectly. *Leadbitter* v. *Farrow*, 5 Maule & Selw. 345. Stone & Kent have received the goods without paying for them; the plaintiff is the vendor, and is entitled to demand payment in this action. *Feise* v. *Wray*, 3 East, 93; *Ilsley* v. *Stubbs* 9 Mass. R. 65. It will be said that the plaintiff negotiated the bill, and that it has been paid. That does not concern the defendant, who has not paid for the goods; and Wiggin has recovered a judgment against the plaintiff for the amount of the bill. The plaintiff submitted to a default;

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which is evidence that the dishonor of the bill was duly notified to him; or he might waive the want of notice. Further, he was not entitled to notice, having no funds in the hands of the drawee; he drew on the faith of funds of Stone & Kent which had been withdrawn. *Clarke* v. *Noel*, 3 Campb. 411; *Owenson* v. *Morse*, 7 T. R. 64.

Fletcher, for the defendant.

Per Curiam. The real question in this case is, who shall bear the loss of the 500*l.* in consequence of the bankruptcy of Williams. Wiggin, upon looking into the books of Williams and finding a balance in favor of Draper & Stone, who were not parties to the bill, pays the bill for their honor, probably mistaking them for Stone & Kent. Wiggin thus became the holder. It was incumbent on him to see that the proper notices were given to the parties against whom he intended to claim. No notice of the dishonor was ever given to Grosvenor the drawer; and Wiggin, finding that he made a mistake in regard to Draper & Stone, brings this action in the name of Grosvenor, in order to recover of the defendant, who, it is said, has received the goods, but has not paid for them.[1] *March 23d*

As Grosvenor had no notice, Wiggin could have no remedy against him on the bill. If Grosvenor was acting on his own account, he might waive the want of notice so far as regards himself, but not as regards the defendant; but if he was the agent of the defendant in drawing the bill, the case should be considered the same as if the defendant had actually drawn it and the holder had given him no notice of its dishonor. It would be the common case where a party is discharged by the laches of the holder. The letter of November 12, 1825, to Stone & Kent, would not excuse the want of notice to the drawer.[1] 83

It is said that Grosvenor drew the bill when he had no funds in the hands of Williams, and so was not entitled to notice. But this principle does not apply. He had good reason to expect that Stone & Kent would have funds there subject to his order; and further, Williams had agreed to honor his

[1] See *Martin* v. *Ingersoll*, *ante*, 1.

[1] See *Wallace* v. *Agry*, 4 Mason, 336.

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drafts; he was therefore entitled to notice. *French* v. *Bank of Columbia*, 4 Cranch, 141.[2]

Grosvenor's agreement with Wiggin is not to prejudice the defendant. He has no right to call on the defendant, if he has waived any defence which the defendant, if he had been the drawer, might have made.

Nonsuit made absolute.

David Hill *versus* Ralph Haskins *et al.*

The plaintiff declared against the defendant for erecting a building on a strip of land, "which ought forever to remain open for the accommodation of the estates of the parties," and produced a deed of such strip reserving to the parties the privilege of passing over it "for the sole purpose of repairing either of said estates"; and there was no averment that the plaintiff had been prevented from repairing his estate, nor any evidence that he intended to repair, or that he had given notice to the plaintiff of any such intention. *Held*, that the declaration was not supported by the evidence.

The plaintiff declared against the defendant for obstructing a triangular strip of land "which ought forever to remain open for the accommodation of the adjoining estates of the parties," but the evidence was of such an easement in a strip in the form of a parallelogram; whereupon leave to amend was granted.

Trespass on the case. The declaration alleged, that the plaintiff was the owner and was in possession of certain land
84 and buildings, situate in Boston and bounded northerly on Essex street, which formerly belonged to John Trench, under whose title the plaintiff held; that Trench was also owner of a triangular piece of land lying to the west of the plaintiff's lot, being one hundred feet in length from south to north, fourteen feet wide at the south end, and coming to a point at the other on Essex street; that in 1788 Trench conveyed this triangular piece to Thomas Hill, under whose deed the defendants held; and that this piece "ought to be and forever

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[2] See Bayley on Bills, (2d Am. edit.) 306; *Austin* v. *Rodman*, 1 Hawks 195; *Campbell* v. *Pettengill*, 7 Greenleaf, 126; *Hill* v. *Norris*, 2 Stewart & Porter, 114.

The burden of proof is on the holder of a bill, to show that the drawer had no funds in the drawee's hands, in order to excuse want of notice. *Baxter* v *Graves*, 2 A. K. Marshall, (Ken.) 152; *Ralston* v. *Bullits*, 3 Bibb, 261

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remain open for the accommodation of the plaintiff's estate" and the estate formerly of Thomas Hill on the opposite side of this triangular piece, and now belonging to and in possession of the defendants; but that the defendants, in 1823, intending to deprive the plaintiff of the enjoyment of his land and buildings, erected a wall and building on the triangular piece, and thus appropriated it to their exclusive use, "by means of which the plaintiff is annoyed and incommoded in the use, possession and enjoyment" of his land and buildings.

It appeared from the evidence, that the defendants had left a passage-way about four feet wide, of the whole length of the piece of land in question, next the plaintiff's lot, for the common use of the plaintiff and themselves. The plaintiff produced Trench's deed of the triangular piece to Thomas Hill, dated 1788, which contained a provision, "always reserving to said Trench and the said Hill the privilege of passing to, or going on either of said lands for the sole purpose of repairing either of said estates," meaning their two estates adjoining.

The plaintiff also produced in evidence the deed, dated 1809, by which Thomas Hill conveyed his adjoining estate, and also the triangular piece, to Ralph Haskins and others; and of which the defendants admitted themselves to be in possession. In this deed, at the conclusion, the grantor says; "It is to be understood, that that part of the above described land about four feet wide, conveyed to me by Trench, is forever to remain open for the accommodation of said Trench's estate, and the estate above described." These deeds presented the only material evidence relied upon by the parties.

As the plaintiff had not alleged in his declaration, that he had been prevented by any act of the defendants from repairing his estate, and had produced no evidence of his intention 85
to repair, or of notice to the defendants that he wanted to repair, and had by the deed no right to use the land in question except for that purpose, *Parker* C. J. directed a nonsuit, subject to the opinion of the whole Court.

S. D. Parker and *T. Fuller*, for the plaintiff, insisted that *March 14th*
the declaration set forth a sufficient cause of action. Whether the right of the plaintiff was attempted to be exercised or not, is immaterial. This invasion of his right, if not resisted,

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Hill v. Haskins.

might by lapse of time become evidence in favor of the wrong-doer, and therefore the action well lies. *Wells* v. *Watling*, 2 W. Bl. 1234; *Hobson* v. *Todd*, 4 T. R. 73; *Weller* v. *Baker*, 2 Wils. 422. The smallness of the damage is no ground for a nonsuit. *Pindar* v. *Wadsworth*, 2 East, 161; *Prescott* v. *Trueman*, 4 Mass. R. 627; *Wyman* v. *Ballard*, 12 Mass. R. 306.

Minot, for the defendants.

March 23d. PARKER C. J. delivered the opinion of the Court. The nonsuit was rightly ordered, because the plaintiff's proofs did not support his allegations. He counts upon a right to have a certain area, described in his declaration, at all times kept open and unincumbered. The deed under which he claims this right, to wit, from Trench to T. Hill, of the very land in which the easement is claimed, only reserves to the grantor and grantee the right to pass and repass over the same, in order to go upon either of the estates to which this adjoins, for the sole purpose of making repairs. The land thus granted with this reservation was in a triangular form, being fourteen feet at the base, and coming to a point on Essex street; and it is not averred that the right to pass and repass had been obstructed. This deed was made in 1788; but afterward, when Hill the grantee conveyed his estate, including this land, to the defendants, he provides, "that that part of the land, about four feet wide, conveyed to him by Trench, is forever to remain open for the accommodation of both the estates." This was in 1809. Without doubt, before this time, by compact between the owners of the several estates, the privilege before existing in the irregular area, had been exchanged for a regular passage-way between the estates, in the form of a parallelogram four

86 feet wide. Under this latter deed, the plaintiff may claim such an easement as he has described in his writ, that is, that it shall forever remain open and unincumbered; but it is altogether different from the *locus in quo*, in which the easement or privilege exists, as described in his writ. The nonsuit was right, but the plaintiff may amend, on paying costs.[1]

[1] See Revised Stat. *c.* 100, § 21, 22; *St.* 1839, *c.* 151.

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LUTHER BIXBY *et al. versus* THE FRANKLIN INSURANCE COMPANY

A bill of sale is not necessary to transfer property in a ship.

The bill of sale and custombouse register or enrolment, are not conclusive evidence of property in a ship.

A party interested in a ship, but whose name does not appear in the customhouse documents or bill of sale, is not obliged, for this reason merely, to disclose the nature of his interest at the time of getting insurance, unless he is questioned in this respect by the underwriters.

THIS was assumpsit on a policy of insurance made by the defendants, on the 3d of January, 1825, insuring 1500 dollars on the brig Columbia, valued at 2000 dollars, and 2500 dollars on her cargo, for a voyage from Boston to a port or ports in the island of St. Domingo, and thence to her port of discharge in the United States. The brig sailed on the voyage on the 7th of January, bound for the city of St. Domingo, as the mate testified, and on the 10th met with a storm, which occasioned the injury for which the loss was claimed. After the weather moderated, she bore up for the most convenient port and made that of Paix, in the island of St. Domingo, but found it impracticable to make the necessary repairs there or at any other port at which she touched in the island. She subsequently went into Maragoan, where the cargo was discharged; and temporary repairs being there made, she sailed thence to Wilmington in North Carolina, where thorough repairs were made; after which she returned to Maragoan, and took a return cargo, which she brought to Boston. On the trial, the defendants, in order to diminish the plaintiffs' claim for seamen's wages, victualling, &c. proposed to show by the log-book of the former voyage, that the brig had, under the same master 87
but a different mate, made a voyage from Wilmington to Maragoan, and thence to Boston, as a ground of presumption that the same voyage had been intended in this instance; and so, that she had not gone out of the course of the voyage on which she was in fact destined. This testimony was rejected by the *Chief Justice*, before whom the trial was had.

The policy was made in the names of Bixby, Valentine & Co. and Joseph Hibbert, the master. The firm of Bixby,

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Bixby v. Franklin Ins. Co.

Valentine & Co. consisted of Luther Bixby, J. J. Valentine, and Orpheus Holmes. Before this copartnership was formed, the brig belonged, in equal shares, to Holmes and Hibbert, in whose names she continued to be registered at the custom house after the partnership was formed in 1824, until the loss took place, and afterwards until she was sold by the assured. Holmes had not made any formal transfer of his half of the brig to Bixby, Valentine & Co. by a bill of sale; but when the copartnership was established, he was credited in the books of the firm for the value of one half of the brig, which was treated as the property of the company, and the repairs made upon her from time to time, until she was sold, were paid for by them. On the 4th of January, the day after the policy was made, Holmes and Hibbert surrendered their enrolment, and took out a register for the brig, when Holmes made oath that he and Hibbert were the only owners of the brig; and when she was afterward sold, the bill of sale was made by Holmes and Hibbert only.

The defendants objected to the payment of the loss on the ground, 1. That Bixby and Valentine had no legal interest in the vessel; 2. That if they had any insurable interest, it was not insured by this policy.

The jury assessed damages on the ground of a partial loss.

March 17th. *Shaw* and *Peabody*, for the defendants. The log-book should have been admitted.

The old authors all say that a transfer of a ship should be by writing. See Story's Abbott, (ed. 1829,) 1, cites *The Sisters*, 5 Rob. Adm. R. 138; *Weston* v. *Penniman*, 1 Mason, 317; 3 Stark. Ev. 1156. This Court have decided that a registered owner is liable for repairs. *Tucker* v. *Buffington*, 15 Mass. R. 477. Written evidence of ownership is required

88 in courts of admiralty; 1 Mason, 317; and this is a question in respect to which the rules of those courts are entitled to great weight. It is moreover important that the documents should show the real owners, in order to prevent secret trusts and liens, and to protect the rights of creditors and other persons. In this case there was no delivery of the vessel to Bixby and Valentine, unless there was a constructive one. Holmes and Hibbert alone made the bill of sale of her afterwards. It

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the company had an interest which they could insure, it was such a one as they were bound to disclose to the underwriters. *Higginson* v. *Dall*, 13 Mass. R. 101 ; *Riley* v. *Delafield*, 7 Johns. R. 522.

Hubbard and *Fletcher*, *contrà*, said, that though the maritime law, as administered by courts of admiralty, might consider the customhouse documents as conclusive evidence of the property in the vessel, yet this rule had never been adopted in the courts of common law ; and they relied upon *Lamb* v. *Durant*, 12 Mass. R. 54 ; *Bartlett* v. *Walter*, 13 Mass. R. 269 ; *Taggard* v. *Loring*, 16 Mass. R. 336 ; *United States* v. *Willings*, 4 Cranch, 48 ; *Wendover* v. *Hogeboom*, 7 Johns. R. 308.

March 23d

PARKER C. J. delivered the opinion of the Court. We are of opinion that the proof of property in the vessel insured is sufficient. Holmes, being the owner of one half, could transfer by a contract to sell, accompanied with possession in the purchasers. When he was admitted into the partnership, his moiety of the vessel was turned into the common stock ; the entry in the books of the firm was, between Holmes and his partners, a sufficient transfer ; and the accounts kept of the proceeds of the vessel and of the repairs, prove a use and possession by them, which is at least equivalent to a formal delivery at the time of the transfer.

The fact of the apparent ownership from the documents in the customhouse, and the new register in the names of Hibbert and Holmes after the transfer to the company, do not affect the question of property, unless the sale should be contested by a creditor of Holmes ; and then they might be *primâ facie* evidence that the property was his.[1] We do not find, that a bill of sale or other instrument in writing or under seal is essential to the transfer of a ship, more than of any other chattel. 89 Such a document may be required in the admiralty courts , but we are not aware that the principle has been introduced into the common law. The cases of *Lamb* v. *Durant*, and *Taggard* v. *Loring*, in our own Reports, establish a contrary doctrine. We think a bargain, a consideration paid and a delivery,

[1] See 2 Phillips on Ins. 36, 37, 38; *Ring* v. *Franklin*, 2 Hall, (New York,) 1.

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will pass the property from one to another, in a ship or other vessel. Inconveniences may arise in foreign countries and in the customhouse, from the want of a bill of sale; but the transfer is good between the parties.[1]

Then the question remains, whether the plaintiffs were bound to state their title to the underwriters. This point has been settled in the case of *Locke* v. *The North American Ins. Co.* 13 Mass. R. 61; in which, after an examination of the authorities, the Court came to the result, that the special nature of the title need not be disclosed unless asked for.[2]

In this case, there would have been no difficulty in the abandonment. Holmes was the registered owner of one half; he was one of the insured; he could not deny the joint interest of his partners, having made his moiety a part of the partnership stock; and an abandonment by the partners would have transferred the moiety to the underwriters.

The log-book of a former voyage was inadmissible as evidence in this case, as it is a document only for that voyage to which it relates. To use it in the present case, would be altogether improper, as it is unsupported by testimony, and in truth is a journal of proceedings affecting other interests and other parties.

Judgment according to verdict.

[1] See 2 Phillips on Ins. 31, 32; *Ohl* v. *Eagle Ins. Co.*, 4 Mason, 390.

[2] See 2 Phillips on Ins. 81, 82; *Ring* v. *Franklin* 2 Hall, (New York,) 1

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IGNATIUS SARGENT *et al. versus* THE FRANKLIN INSURANCE COMPANY.

The by-laws of an insurance company provided that the certificates of stock should be transferable only at the office of the company, by the holder personally or by his attorney, and that transfers should be authenticated by the president, and attested by the secretary, and that it should be the duty of the president to attend at the office during business hours. An assignment of some shares was made to two copartners, with a power to them *both*, to transfer the same on the books of the company, and *one* of the partners called at the office during business hours, and, the president being absent, exhibited to the secretary the assignment and power of attorney, and demanded that the shares should be transferred on the books of the company and certificates issued to himself and his copartner, but the secretary declined doing any thing in the matter, saying it was the president's business. The assignors were indebted to the company in one sum that was then due, and in others not then due. *Held*, that the company had no lien upon the shares as security for their demands against the assignors, and that they were bound to make a transfer of the shares on their books as demanded, and to issue new certificates to the assignees.

The purchaser of shares of the stock of an insurance company, is entitled to a certificate, on producing evidence of the assignment, to the officers of the company at their office.

The shares of the capital stock of an insurance company are personal property of an assignable character, and any by-law of such company which should require the transfers to be made only at its office personally or by attorney with the consent of the president, would be a restraint contrary to the general law of the Commonwealth, which permits the right of personal property and incorporeal hereditaments to be transferred in various ways.

An insurance company has no implied lien on the shares of the stock, as security for debts due from any of the stockholders.

Dividends declared by an insurance company, on shares of a stockholder indebted to the company, may be retained by the company towards satisfaction of the debt.

Where an insurance company, being bound to enter on its books a transfer of shares in pursuance of an assignment of the same, made by the former holder, refused to enter such transfer, and caused the shares to be attached and sold as the property of the former holder, it was held to be liable in damages to the assignees of the shares; and the amount of damages in such case, is the value of the shares at the time of such refusal, with interest from that time.

THIS was assumpsit to recover damages of the defendants for refusing to transfer to the plaintiffs, (copartners,) on the books of the company, and deliver to them a certificate of twenty-five shares of the capital stock of the company, standing in the names of Adams & Amory, and alleged to have been assigned by them to the plaintiffs. Adams & Amory had held a certificate of these shares, dated February 10, 1824,

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and made an instrument of assignment of the same to the plaintiffs, dated May 24, 1826. On the next day, May 25th, before 12 o'clock, and during business hours, Brooks, one of the plaintiffs, called at the office of the company, and, the president of the company being absent, exhibited to the secretary the instrument of assignment with the power of attorney from the assignors to the assignees, empowering them to make a transfer of the shares on the company's books, and demanded certificates to be issued in the names of the assignees, offering, at the same time, to surrender the certificates of Adams & Amory. The secretary read the assignment and power, but declined doing any thing in the matter, saying it was the president's business.

On the same day, May 25th, at 12 o'clock, the defendants caused the same shares to be attached, at their own suit against Adams & Amory. On the 9th of June and the 19th of October following, the defendants caused the same shares to be attached a second and a third time in other suits commenced by them against Adams & Amory on two other demands which had respectively become due at those times. Judgment was recovered in all these suits and executions issued, on which all these shares were successively sold, and the proceeds paid over to the company in satisfaction of the demands against Adams & Amory.

The by-laws of the company make it the duty of the president "to attend at the company's office, during the hours of business," to discharge the various duties of his office. Certificates of stock are required, by the by-laws, to be *authenticated* by the president, and it is made one of the duties of the secretary, "to attest all certificates and transfers of stock." The certificates bore upon the face of them, that they were "transferable only at the office of said company, by [the holders] or their attorney."

The plaintiffs, in their first count, demanded damages on account of the shares not having been transferred to them on the books of the company, according to the assignment; and in the second count, they claimed the dividends that had accrued upon the shares.

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It was agreed that the plaintiffs should be nonsuited, or the defendants defaulted, according to the opinion of the Court.

Aylwin, for the plaintiffs. Shares in an insurance company or other moneyed institution, form an exception to the rule that choses in action are not assignable. The acts incorporating these companies and regulating the assignment of the shares, show their assignable quality. The only difference between these and other choses in action, consists in the remedy. *Master* v. *Miller*, 4 T. R. 340. Other choses in action are assignable in equity only, and an action must be brought in the name of the assignor; these are assignable at law. The mode of transfer is the same, unless regulated by statute. No written assignment is necessary; delivery of the certificates or other evidence of property, perfects the title. *Prescott* v. *Hull*, 17 Johns. R. 284, 292; *Jones* v. *Witter*, 13 Mass. R. 307; *Briggs* v. *Dorr*, 19 Johns. R. 95. In the present case the plaintiff's title was complete on the assignment and delivery of the certificates. *Bates* v. *New York Ins. Co.* 3 Johns. Cas. 238; *Quiner* v. *Marblehead Soc. Ins. Co.* 10 Mass. R. 476; *Kane* v. *Bloodgood*, 7 Johns. Ch. R. 132. So it has been held respecting shares in a partnership or joint stock company. *Alvord* v. *Smith*, 5 Pick. 232. The 5th section of the act of incorporation provides that the president and directors shall have power to make by-laws touching the transfer of the shares, but the only by-laws referring to this subject are those by which the president is required to *authenticate* transfers, and the clerk to *attest* the certificates. Under this authority, the by-laws might regulate in a reasonable manner the exercise of a right, but could not take it away or impose unreasonable restraints. 2 Kyd on Corp. 122. The object of the above by-laws does not distinctly appear. If it was merely to make an entry of the new corporator on the books, it may be valid; but if to require the president and secretary to witness all transfers, it would be unreasonable, and so void. The expression *authenticate*, used in this by-law, seems to mean to *manifest, to make known by authority*. That notice to the secretary, of the assignment, is sufficient to complete the title, was distinctly held in *Quiner* v. *Marblehead Soc. Ins. Co.* 10

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Mass. R. 476, and not questioned in *Bates* v. *New York Ins. Co.* 3 Johns. Cas. 238.

It is objected that the assignment was accompanied by a power to both partners *jointly* to assign on the company's books, and only one of them appeared at the office for this purpose. But either partner can assign the partnership property. Gow on Part. 73; *Lamb* v. *Durant*, 12 Mass. R. 54.

It is said that no application was made to the president. The plaintiffs called at the office during business hours, when, according to the by-laws of the company, it was his duty to be there. It was not necessary that both partners should be at the office at the same time, as it was not an act which must necessarily be done by both simultaneously; it might be done by them successively, or one of them might have given his subsequent assent. *Ball* v. *Dunsterville*, 4 T. R. 313; *Ludlow* v *Simond et al.* 2 Caines's Cas. in Er. 1, 42; *Mackay* v. *Bloodgood*, 9 Johns. R. 285. The secretary refused to enter the transfer, not because both partners were not present, but because it was the business of the president. A special notice of the assignment is not necessary; it is enough if the party has such a knowledge as is sufficient to put him on inquiry. *Anderson* v. *Van Alen*, 12 Johns. R. 343. Subsequent notice of a previous assignment, will defeat an attachment made by a *bonâ fide* creditor. *Dix* v. *Cobb*, 4 Mass. R. 508. The attachment at the suit of the corporation, made immediately after notice of the assignment, by the direction of the president, is sufficient evidence of his refusal. This act and those by which it was followed, showed an intention to appropriate the shares to the use of the company.

The debt due to the company constituted no lien on the shares. The quarter part of it was not due at the time of making the assignment. A lien could arise only by some agreement, or some by-law having the force of an agreement.

In regard to damages, the plaintiffs are entitled, not only to the specific shares, but also to damages for their not being transferred at the time of the demand, and to all dividends declared upon them since the assignment. If the shares cannot oe specifically restored to the plaintiffs, then they are entitled to a full indemnity in damages; that is, to the value of the shares

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at the time of assessing their damages, though they should have risen in value since the time of demand of the certificates. *Shepherd* v. *Johnson*, 2 East, 211; *Forest* v. *Elwes*, 4 Ves. 497; *M'Arthur* v. *Seaforth*, 2 Taunt. 265.

In regard to the form of action and mode of declaring in this case, it is a rule, that all duties imposed by law on corporations raise implied promises, for the performance of which an action may well lie. *Bank of Columbia* v. *Patterson's Adm.* 7 Cranch, 306; *Rex* v. *Bank of England*, 2 Doug. 524; *Hayden et al.* v. *Middlesex Turnpike Corporation*, 10 Mass. R. 400; *Danforth* v. *Schoharie Turnp. Co.* 12 Johns R. 227; *Overseers of N. Whitehall* v. *Overseers of S. Whitehall*, 3 Serg. & Rawle, 117.

J. T. Austin, for the defendants, contended that the alleged causes of action were inconsistent, and could not be joined; that the plaintiffs could not demand damages on account of the shares not being transferred, whereby they were prevented from being the legal holders, and at the same time claim the dividends which had accrued on the shares, and to which only the legal holders could be entitled.

In all transfers of the stock, the corporation resumes the shares to itself and regrants them to the new holders, who can obtain a title only in pursuance of the rules of the company, and by a compliance with the conditions prescribed by the charter and by-laws. One of the conditions, as appears by the form of the certificate, is, that all transfers shall be made in the office of the company and in the presence of the president. Such a transfer not having been made in this case, the plaintiffs did not become members of the company, or, in other words, were not *owners* of the shares. The assent of the president, as well as that of the former holders, was necessary in order to effect a transfer.

No legal demand of a transfer was made on the officers of the company. The power of attorney from Adams & Amory to make the transfer was to *both* the plaintiffs; only one of them called at the office for this purpose; whereas, the power being joint, the agency of both of them was requisite in its execution. *Grindley* v. *Barker*, 1 Bos. & Pul. 229; *Green* v. *Miller*, 6 Johns. R. 39. The circumstance of their being

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copartners does not give each one of them an authority to execute a power granted to the other by a third party, as in this case by Adams & Amory. This power to transfer, is a distinct thing from the assignment; it might just as well have been given to other parties, and could be executed by the plaintiffs in no respect differently from the manner in which any other persons, appointed instead of them, must have executed it. Until the transfer should be made, the plaintiffs could have no control of the shares as partnership property, since they could not become such, until after the transfer. This shows the distinction between the present case and that cited from Gow, 74, since here the plaintiffs could not act under the power as copartners. In *Quiner* v. *Marblehead Social Ins. Co.* 10 Mass. R. 476, the transfer was of partnership property; here the shares had not become the property of the partnership.

But if an equitable assignment has been made in this case, it does not give the plaintiffs a right of action in their own names. Suppose the assignment had been of a book debt, note not negotiable, or policy of insurance; it is evident that in such case the right of action would have remained in the assignors. The declaration is in *assumpsit*, but the defendants have never made any promise to the plaintiffs. Admit that "all duties imposed on corporations *by law*, raise implied promises, for the enforcement of which an action may well lie;" as laid down by *Story* J. in *Bank of Columbia* v. *Patterson*, 7 Cranch, 306; no *law* imposes on this corporation a duty to give an assignable character to their stock. This is a matter of agreement among themselves; the promise is made by the corporation to their admitted corporators; and it is too much to say that the promise is assignable, as well as the stock. It is made on conditions, and these have not been complied with. Until the title to this stock was divested from Adams & Amory, it could not be vested in the plaintiffs. If several acts are necessary to complete this title, the plaintiffs have no claim until every one of those are perfected. The transfer on the defendants' books is analogous to delivery of personal chattels; until delivery the property is not changed.

As Adams & Amory were indebted to the defendants, the

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defendants say they were not obliged to admit the transfer before the debt was paid. The check upon the freedom of transfers, which the corporation held, by requiring that transfers should be made only by the appearance of the assignor or his attorney at the office and by the authentication of the president, must mean *something*. It was intended to guard against transfers injurious to the corporation. The power of assenting to a transfer implies that of refusing assent. This is no injury to the purchaser, who knows that the assignment gives only an inchoate imperfect right, to be made indefeasible by the consent of the company; which, because it *must* be asked, *may* be refused.

As to damages, if, as the plaintiffs contend, the title to these shares passed to them by the assignment of Adams & Amory, then they, being the legal owners, have sustained no damage by the refusal of the defendants to issue certificates. They may claim the dividends. If they did not become the legal owners, then the dividends cannot be claimed by them, since they can be demanded only by, and are payable only to, the legal holders of the shares. One having a bond merely for the conveyance of real estate, is not chargeable with the taxes, nor can he receive the rents. If the plaintiffs had the right to the shares, and the defendants prevented them from the enjoyment of that right, then the value of the shares at the time of refusing to issue the certificates, is the amount of damages to which they are entitled. *Gray* v. *Portland Bank*, 3 Mass. R. 364, 390.

PUTNAM J. delivered the opinion of the Court. We think it cannot be maintained, that the right to the shares in the capital stock of this corporation cannot be transferred without a literal compliance with the by-laws. It is personal property. 3 Dane's Abr. 108; 5 Dane's Abr. 157. It might be conveyed by will; it might descend from an intestate to his heir. It may be assigned without deed, by a delivery of the certificate with an indorsement upon it for a valuable consideration. *Quincy* v. *Marblehead Ins Co.*, 10 Mass. R. 476. And in such cases the legatee, heir or assignee would be entitled to have the transfer made in the books, and to a certificate of his property. A by-law which limits the transfer of the stock to

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be made only at the office personally or by attorney, and with the assent of the president, would be in restraint of trade and contrary to the general law of the Commonwealth, which permits the right to personal property and incorporeal hereditaments to be transferred in various other ways. The purchaser or other person entitled should make his right known to the corporation, that it may be entered upon their books; to the end that they may have proper evidence to whom the dividends or profits should be paid.

The objection in the case at bar is not so strong as that which was made in *Quiner* v. *Marblehead Soc. Ins. Co.* above cited. By the act of incorporation of that company it was provided, that no transfer should be permitted to be valid, until all the instalments were paid in. That was construed not to extend to a transfer by a debtor to a creditor, but as only intended to prevent speculation in the scrip, before all the instalments were paid. And it was held that the original subscriber might lawfully transfer his right in the shares in payment of a debt, when only part of the instalments had been paid, and that the assignee would be entitled to a certificate of property upon payment of the residue.[1]

It is however contended, "that no legal demand was made to change the legal title of the shares."

All that could be required of the person demanding a transfer on the books, would be, to prove to the corporation his right to the property. In this case one of the joint assignees produced the assignment, with the original certificate of the former owners, and claimed for himself and his partner to be the purchasers for a valuable consideration. We think that was a sufficient notice of the assignment and request to have the transfer made upon the books of the corporation.

We have considered the case upon the validity of the assignment alone, and just as if there had not been a joint power to the plaintiffs from the assignors. And we are satisfied that the

[1] See *Gilbert* v. *Manchester Iron Manuf. Co.*, 11 Wendell, 627; *Sargent* v. *Essex Marine Railway*, 9 Pick 204; *Boardman* v. *Osborn*, in Essex, 1839; *Plymouth Bank* v. *Bank of Norfolk*, 10 Pick. 454; *Nesmith* v. *Washington Bank*, 6 Pick. 324; *Northrop* v. *Newtown &c. Turnpike*, 3 Connect. R. 544; *Malborough Manuf. Co.* v. *Smith*, 2 Connect. R. 579; *Oxford Turnpike* v. *Bunnel*, 6 Connect. R. 552.

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assignment alone gave to the plaintiffs a right to the property, and by the operation of the law one partner might make a legal demand for both. In *Lamb* v. *Durant*, 12 Mass. R. 57, the chief justice well observed, that "there seems scarcely an act contemplated to be done by merchants, which one copartner, acting for both, cannot do as effectually, to bind the whole copartnership, as if each member had acted."[a]

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This assignment would clearly be good as between the parties to it. Adams & Amory had granted all their right to the plaintiffs, and the defendants had notice of it before they attempted to obtain the property for themselves by legal process. We have said that the defendants had notice, because we are satisfied that the notice to the secretary was sufficient notice to the corporation. It is no answer that the president of the corporation was not at his post in the hours of business when the demand of the transfer was made. He should have been there, and the corporation is not entitled to use his neglect of duty in their defence. There cannot be any room to doubt, from the evidence in the case, that he might have given authenticity to the transfer, if he and the corporation had pleased, before they attached the shares for themselves. If that had been done, the plaintiffs would have had legal evidence added to their equitable right of property. Upon the production of that evidence and request, it became the duty of the corporation to transfer the shares to the plaintiffs; and the corporation is bound to compensate them for the injury they have sustained.

The law supposes that the corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of non-feasance or misfeasance. 3 Dane, 109; 5 Dane, 160; *Bank of Columbia* v. *Patterson*, 7 Cranch, 299. In *pp.* 305, 306, Mr. Justice *Story*, in an able, learned and concise statement of the powers, duties and liabilities of corporations, observed, that "all duties imposed on them by law, and all benefits conferred at their request,

[a] See *Egbert* v. *Woods*, 3 Paige, 523; *Pierpont* v. *Graham*, 4 Wash. Cir. C. R. 232; *Harrison* v. *Sterry*, 5 Cranch, 300; *Cady* v. *Shepherd*, 11 Pick. 400; *Haven* v. *Hussey*, 5 Paige, 30; *Howes* v. *Bayley*, 20 Pick. 96; *Morse* v. *Bellows*, 7 N. Hamp. R. 550.

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raise *implied* promises, for the enforcement of which an action may well lie." The principle had been recognised in this State in the cases cited by *Story* J. and by the learned author of the Abridgement of American Law.[1]

The suggestion in regard to the action, viz. that it should be in the name of the assignors, cannot be sustained. We think that the holders of these shares had a right to transfer them so that the assignees would have a right of action in their own names for any injury which they might sustain touching this property. The chief justice, in *Howe* v. *Starkweather*, 17 Mass. R. 243, considered shares in incorporated companies
99 not to be chattels, but to have more resemblance to choses in action, being merely evidence of property; but he said also, "If, under an irregular sale, certificates of the shares were given to the purchaser, the case would be more analogous to the sale of *a chattel*; for the delivery of the certificate would be like the delivery of the chattel, and the transfer might be considered complete."[1] In the case at bar, the certificates of the shares were delivered to the plaintiffs, together with the assignment; so these shares, according to the case cited, would be more like chattels than choses in action.

It is contended that the title was not complete in the plaintiffs before the attachment which was made by the defendants, and that it was just as necessary that the transfer upon the books should be made with the assent of the president, as that a chattel should be delivered, to change the property. But the defendants are not in a situation to raise this objection. An attaching creditor without notice, would prevail against a vendee who had not perfected his title. *Lanfear* v. *Sumner*, 17 Mass. R. 112. But the defendants had notice of the transfer, and were required to give legal authenticity to it before they made their attachment. By their legal process, therefore, they

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See *Baptist Church* v. *Mulford*, 3 Halsted, 182; *North Whitehall* v. *South Whitehall*, 3 Serg. & Rawle, 117; *Chesapeake &c. Canal Co.* v. *Knapp*, 9 Peters, 541; *Frankfort Bank* v. *Anderson*, 3 A. K. Marshall, (Ken.) 1; *Beverly* v. *Lincoln Gas and Coke Co.*, 6 Adolph. & Ellis, 829, and 33 Eng. Com. Law Rep. 222; 2 Kent, (3d ed.) 291, and cases cited in notes.

[1] See Angell & Ames on Corp. 316; Long on Sales, (Rand's edit.) 259, 260.

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cannot defeat the right which the plaintiffs had acquired by the assignment.

It is further contended, that Adams & Amory were indebted to the defendants, and therefore they were not obliged to admit a transfer of the shares until their debt was paid. We do not know on what ground that argument can rest, better than that which is suggested, that the assent of the president is to be required to prevent transfers which are injurious to the corporation, and that a power of assenting implies a power of refusing. No authority is cited in support of that position. In *Bates* v. *New York Ins. Co.*, 3 Johns. Cas. 238, a similar claim was rejected. The company had refused to transfer unless the assignee would pay the debts due from the assignor, and the assignee who paid under those circumstances, was permitted to recover back the money, on the ground that the corporation had no right to require such a payment. A different rule, and as it seems to us a reasonable one, was adopted in regard to the dividends which were due when the corporation had notice of the assignment. The money then being in the 100
hands of the company, was considered as appropriated towards a debt which was then actually due. But the company were held obliged to make the transfer on the day when the last instalment was paid, and the assignee was to have the dividends thereafter to be made.

It does not appear from the report in the case at bar, that there were any dividends in the defendants' hands at the time when the plaintiffs demanded the transfer; but we are of opinion, that whatever money they then had on hand should be considered as pledged towards any just debt which was then due from the assignors. Any surplus money then on hand would pass with the shares, in virtue of the assignment, and is to be added to the value of the shares.

But the defendants have taken the shares on their execution, and so appropriated the same to their own use. The only remaining consideration is, by what rule the damages shall be assessed.

For the defendants it is contended, on the authority of *Gray* v. *Portland Bank*, 3 Mass. R. 364, that the value of the shares at the time of the demand and refusal to transfer them,

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should be the measure of damage. It has been contended for the plaintiffs, that as the defendants have taken the shares for which the plaintiffs had paid, they should be held to pay as much, at the least, as they would be liable to pay for not transferring stock which had been loaned, or stock which had been paid for in advance; according to the rule adopted in New York, and stated in *Clark* v. *Pinney*, 7 Cowen, 681 and the cases there cited. Speaking for myself only, I should have been inclined to adopt that rule; which would have charged the defendants with any advance upon the value between the time of the demand and the trial. But all my brethren prefer the other rule, and on the ground that the defendants should not be held to pay more for this property than for goods which they had wrongfully converted to their own use. We decided in *Kennedy* v. *Whitwell*, 4 Pick. 466, that in trover for goods, the rule of damages in this Commonwealth is the value at the time of the conversion, notwithstanding the goods had been sold at an advanced price before the trial. And it is to be ob-
101 served, that the certainty and uniformity of a rule may be of more public utility than one which is fluctuating, which may sometimes do more exact justice in a particular case.

The Court is of opinion therefore, that the value of the shares at the time of the demand and refusal to transfer, is to be the measure of the damage.[1] Interest will be added from the time of the demand, on the amount found to be then due, in lieu of any dividends which may have been subsequently declared.

[1] See *Baker* v. *Wheeler*, 8 Wendell, 508; *Whitehouse* v. *Atkinson*, 3 Carr. & Payne, 344; *Parks* v. *Boston*, 15 Pick. 206; *Stone* v. *Codman*, 15 Pick. 300; *Weld* v. *Oliver*, 21 Pick. 565; *Stevens* v. *Lyford*, 7 N. Hamp. R. 360; *Nelson* v. *Ford*, 5 Hammond, 474; Chitty on Contr. (4th Am. ed.) 683 and notes

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DAVID LOW *versus* JOHN DE WOLF.

A advanced money on the outward cargo of a vessel bound to Hamburg, the cargo, for his security, being shipped in his name, though really belonging to B & C, the owners of the vessel. The cargo was sold at Hamburg by the agents of the owners. The ship sailed for Russia, and there took in a return cargo, which was shipped by D & Co. the agents of B & C, and paid for out of the proceeds of the outward cargo which they had received from Hamburg. D & Co. took from E. the master, bills of lading in which the cargo was to be delivered to order or assigns, and no freight was specified. D & Co. indorsed the bills of lading to A and transmitted them to him. But E did not know that they had been so indorsed. During the voyage home the vessel was forced to put into Copenhagen, and seven bundles of hemp were taken out, which, as it could not be restowed, was left by E with merchants there, with orders to have it sold, and the proceeds sent to London to the credit of B, the principal owner. The proceeds were accordingly remitted and received by B, who failed before the ship returned to the United States, but whose failure was not known to the master at the time when he gave these orders. In an action brought by A against E for money had and received to recover the proceeds of the hemp, *held*, that E, not knowing of A's interest in the cargo, was justified in directing the proceeds of the hemp to be credited to B; and that the action could not be maintained.

THIS was assumpsit for money had and received, and was submitted to the Court on the following statement of facts.

The ship Octavia, on the 25th of June, 1825, being then owned three fourths by George De Wolf and one fourth by Daniel N. Morice, as appeared by her register, sailed on a voyage to Hamburg, with a cargo shipped by the plaintiff and consigned by him to Schrœder, Males & Co. The defendant was appointed master of the vessel by George De Wolf and Morice, and received from them a letter of instructions, by which he was directed to proceed to Hamburg and deliver his cargo there as per bill of lading, and from thence proceed to 102
St. Petersburg to the address of Steiglitz & Co. The instructions say, "We have directed them to put on board 200 tons hemp, 250 tons of iron &c. and the residue in manufactures; but if you should find on your arrival that a large quantity of hemp has been shipped for the U. S. and further quantities are coming, say over 6000 tons, you will take a less quantity and more iron and manufactures." By an agreement made before the sailing of the vessel between the defendant and George De Wolf and Morice, the two latter stipulate, as owners, to give the defendant a certain compensation, and he agrees

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to proceed with the vessel "to Hamburg, to land her cargo there and thence proceed to St. Petersburg, Russia, for a cargo for a port in the United States."

The ship proceeded to Hamburg and delivered her cargo to the consignees, and sailed thence to St. Petersburg in ballast At St. Petersburg the defendant advised with Steiglitz & Co. in relation to the purchase of the cargo, and after it was shipped, the defendant signed five bills of lading of the same tenor, dated September 28, 1825, in which Steiglitz & Co. are named as shippers of the cargo, which is to be delivered to "order or to assigns, he or they paying freight for the same goods, with primage and average accustomed."

The vessel sailed for the United States, and during her passage through the Baltic suffered so much damage from severe weather that the defendant was obliged to put into Copenhagen to repair, and there land seven bundles of hemp, part of the cargo. The defendant left the hemp in the hands of Rainals P. De Coninck & Co., directing them in writing to sell the hemp and remit the proceeds to some good house in London, subject to the order of George De Wolf. De Coninck & Co. accordingly sold the hemp and remitted the net proceeds to a banker in London, subject to the order of George De Wolf, who afterwards drew the same out of the hands of the banker. George De Wolf is now wholly insolvent.

Before the vessel sailed from the United States, George De Wolf had conveyed his interest in her to the plaintiff, but the register was not changed. This transfer was made as security
103 to the plaintiff for advances. And the cargo shipped by her in the name of the plaintiff, belonged to George De Wolf and Morice, but was transferred to the plaintiff as security for advances, as appeared by a written contract signed by Low. But the defendant denied any knowledge of the transfer of the vessel or of the contract.

At the time the Octavia sailed from the United States, the plaintiff addressed a letter to Steiglitz & Co. as follows;— "Boston, June 25, 1825. The ship Octavia sails to-morrow for Hamburg with 6992 bags Manilla sugar and 621 bags coffee to the consignment of our mutual friends Messrs. Schroeder, Males & Co., who are instructed, on arrival of the goods,

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to make out and forward you immediately a *pro formâ* sale thereof for you to [draw on] them for, which you will please invest in the following articles to be shipped on board the Octavia on her arrival at your port from Hamburg, viz. 200 tons best clean hemp, and 250 tons new sable iron; one half of the balance of the ship's outward cargo you will invest in good second quality sheetings, &c. In case sufficient freight do not offer to fill the ship, please put on board 20 or 30 tons well assorted patent cordage. I wish you to send me two invoices of this shipment, one of which you will please fill up 'for my account and risk and consigned to me.' In the other invoice you will not say for *whose* account and risk the shipment is made, nor to whom consigned, but leave it *blank*. The bills of lading to be filled up, consigned to order."

The defendant retained one of the bills of lading signed by him, and Steiglitz & Co. transmitted one or more of them to the plaintiff, indorsed by them, "Deliver to the order of Mr. D. Low." But the defendant denies that he had any notice or knowledge of this indorsement.

Steiglitz & Co. handed the defendant a letter to be delivered to George De Wolf, dated August 28, 1825, of which the following is an extract: — "As to the Octavia, our mutual friend Mr. Low has transmitted us an order for what she is to carry home. The 100 tons of hemp bought for the Anne, we are now shipping to Cronstadt that they may be in readiness for the Octavia; the 100 tons of iron you ordered for the above 104
stated vessel are already at Cronstadt, and as the Octavia is to take 250 tons, all new sable, we shall endeavour to procure the remaining 150 tons. * * * Our proceedings shall be guided according to circumstances, and your interest shall be kept at heart. * * * After the supplies are arrived we shall endeavour to purchase for you, and in the mean time take our choice of the parcels of sheetings that are now in the market. Seeing a tendency in the exchange to rise, we availed ourselves of an opportunity that offered itself on the 25th, to draw upon Messrs. Schrœder, Males & Co. of Hamburg, for your account, &c. for which we credit you," &c.

George De Wolf was doing a large business at St. Petersburg through Steiglitz & Co.

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Low v. De Wolf.

The defendant having, in his return voyage, been obliged to put into Liverpool, on the 1st of March, 1826, he addressed a letter to the plaintiff, which commenced as follows; "Since my arrival here I have heard a flying report that Mr. George De Wolf has failed, which I fear will prove too true. In this event you, I presume, have become the proprietor of the Octavia's cargo. I have always made my communications (during this voyage) to Mr. De Wolf, who, I trust, has made you acquainted with the misfortunes which have befallen me from time to time since I left St. Petersburg." The letter then gives a detailed account of the voyage, and of his present situation and prospects, and mentions that he shall be obliged to sell some damaged hemp.

The plaintiff claimed in this action the amount of the sales of the hemp sold by De Coninck & Co. together with interest and exchange. The defendant was to be defaulted, or the plaintiff to become nonsuit, according to the opinion of the Court.

June 24th, 1828.

Welsh, for the plaintiff. The outward cargo belonging to Low and being shipped in his name, the homeward cargo which was purchased with its proceeds equally belonged to him; and the bills of lading being indorsed to him made him the ostensible as well as the real owner of the property. Jacobsen's Sea Laws, 191; *Lickbarrow* v. *Mason*, 5 T. R. 367; *Mason* v. *Lickbarrow*, 1 H. Bl. 357; *Caldwell* v

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Ball, 1 T. R. 205; *Hibbert* v. *Carter*, 1 T. R. 745. It is also evident from the whole transaction, and especially from the defendant's letter of March 1, 1826, that he was aware of Low's interest. If it was necessary then to sell the hemp in Copenhagen, it was the defendant's duty to have the proceeds remitted on account of Low, or to his own order, or to have done nothing until the bill of lading was brought to him.

Shaw and *Bartlett*, for the defendant. The defendant was prevented by perils of the sea from delivering all the cargo pursuant to the bill of lading. It became necessary to leave the hemp at Copenhagen, as it could not be restowed. *Salvus* v. *Ocean Insurance Company*, 12 Johns. R. 109. In directing the disposition of the proceeds of the hemp he acted with good faith and sound discretion, which was all that he was

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bound to do. *The Gratitudine*, 3 Rob. Adm. R. 258; *Searle* v. *Scovell*, 4 Johns. Ch. R. 218. He did not know of the contracts with Low, and could not have ascertained from the bills of lading that Low had any interest in the cargo. *Ogle* v. *Atkinson*, 5 Taunt. 759.

George de Wolf, to whom the remittance was ordered, was the principal owner, and believed to be a man of property. Steiglitz & Co. considered him as owner of the cargo, and credited him with the proceeds of the outward cargo; and the bills of lading did not specify any freight, being the usual mode where the owners of the ship are also owners of the cargo. Under these circumstances, the defendant, until he had notice of the indorsement of the bills of lading, had a right to consider the cargo as belonging to the ship-owners. It is doubtful whether Low was the legal owner of the return cargo; for though an indorsement of a bill of lading generally passes the property in goods, it does not in all cases, nor unless it is intended to produce that effect. 2 Holt on Shipping, 72; *Walley* v. *Montgomery*, 3 East, 590.

The opinion of the Court was delivered at this term by

PARKER C. J. This action is for money had and received. By it the plaintiff claims the proceeds of seven bundles of hemp sold under the defendant's order by De Coninck & Co. The amount was remitted by them to a banker in London, subject to the order of George De Wolf, on whose account it has been paid. The hemp was part of a cargo shipped by 106
Steiglitz & Co. at St. Petersburg on board the ship Octavia, owned by George De Wolf and one Morice, but according to the invoices and bills of lading of the outward cargo, that belonged to the plaintiff, and the proceeds were intended to be shipped to him. Steiglitz & Co. took five bills of lading from the defendant, master of the ship, in which no consignee was mentioned, but the goods were to be delivered to order or assigns; and one of the bills of lading was indorsed to the plaintiff by Steiglitz & Co. and sent on to him; but the defendant denies that he knew of this indorsement, and there is no evidence that he did know of it. On her voyage from St. Petersburg the vessel met with disasters and the defendant was obliged, as the case states, to put into Copenhagen. It is not

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questioned that this act was justifiable, for this action affirms the doings of the defendant in that particular and claims the proceeds of the hemp as sold at Copenhagen, a sale thereof having been made by the order of the defendant. Whether the defendant has made himself liable by virtue of the bills of lading made and indorsed as before mentioned, or in consequence of his order to remit the proceeds on account of De Wolf, depends upon other facts detailed in the case. The outward cargo, though shipped ostensibly by the plaintiff, in fact belonged to De Wolf and Morice, who were the owners of the vessel and of the voyage. By the agreement referred to in the case, between them and the plaintiff, it appears that the latter was only colorably the owner for the purpose of security for an advance of money made by him to them. It does not appear that the defendant knew of the existence of this agree ment, but he knew that the ship belonged to De Wolf and Morice, and that they conducted the voyage. His instructions as to the disposition of the outward and the procuring a homeward cargo were given by them, and the plaintiff is not mentioned therein. Nor does it appear that the plaintiff gave him any directions whatever as to the management of the property or in relation to the voyage. All he can be presumed to know is, that the plaintiff was the shipper of the outward cargo; which he might gather from the invoice and bills of lading;
107 but he had a right, under the circumstances, to suppose that the purpose intended by this was answered by the delivery of the outward cargo; and recurring to his instructions, he would see that the provision for the return cargo was made by De Wolf and Morice and not by the plaintiff. The bills of lading too, which Steiglitz & Co. caused him to sign, furnished no indication to whom the cargo was consigned, and for aught he knew, the consignees would be De Wolf and Morice. At any rate, they stood to him as the conductors of the voyage, and this gave him a right to presume that they were in fact owners of the cargo, or at least that they had such a control over it as to justify him in treating the portion of it sold in Copenhagen as theirs.

Under these circumstances we think the defendant could not be made liable to the plaintiff without notice to him of the

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plaintiff's interest in the cargo, or proof of knowledge on his part of the failure of De Wolf before he ordered the remittance from Copenhagen to him; but it cannot be inferred from any facts in the case that he had such knowledge. Admitting the property in the cargo to have been legally the plaintiff's, yet we think he gave, by the mode of conducting the transaction, such an agency and control to George De Wolf as justified the defendant in dealing with him as owner. The bill of lading indorsed to the plaintiff without doubt vested the legal interest in him, but he had suffered the order and disposition and apparent ownership to remain in the owners of the vessel and the framers of the voyage, and it would be unjust to allow him to claim now of the defendant a sum of money, which by seasonable information of the state of things between him and George De Wolf might have been kept from George De Wolf's hands.

These bills of lading, though *primâ facie* evidence of absolute property in him to whom they are indorsed *bonâ fide* and for a valuable consideration, are nevertheless capable of being explained; as in the case of *Hibbert et al.* v. *Carter*, 1 T. R. 745, where it was held, that though the indorsement and delivery of a bill of lading to a creditor *primâ facie* conveys the whole property in the goods from the time of its delivery, yet if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, the property of the goods is for the purpose of insurance considered to remain in the indorser. The intention here was only to bind the net proceeds, to secure the advance made by the plaintiff, and the defendant was kept ignorant that the plaintiff had any interest in the cargo. We think under these circumstances he is not liable for the proceeds of the part of the cargo necessarily taken out and sold; and therefore the plaintiff has not supported his action.[1]

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[1] See Long on Sales, (Rand's edit.) 292 *et seq.*; *Allen* v. *Williams*, 12 Pick. 300; Abbott on Shipping, (Story's edit. 1829,) 387 *et seq.*

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HENRY BURDITT *versus* HENRY GREW, Executor.

The statute of 1791, *c.* 28, limiting suits against executors and administrators to four years, may be pleaded in bar to a suit in equity as well as a suit at law.

A and B were partners. A died. B, who settled the affairs of the partnership, took a part of the stock to himself, and gave notes to the executors of the other partner, and made several payments to them, and paid all the notes but one, on which the surviving executor brought a suit against B. B then brought a bill in equity against the executor, praying for an account of the partnership business, stating various particulars in the accounts with A, by which he B was injured, and that if the accounts were fairly settled, nothing would be due to the executor on the note, but a balance would be due to B from the executor, and praying an injunction against the suit at law. The defendant demurred to so much of the bill as did not relate to the partnership dealings and the defendant's capacity as executor, and as to the residue of the bill, pleaded the statute of limitation of four years. The Court sustained the demurrer, and *held*, that the payments to the executors did not show any ground for equitable interference unconnected with the partnership transactions, and that the suit in equity as to them was barred by the statute.

In pleading matters of substance, the same strictness is required in equity as at law.

In pleading the statute of limitations respecting suits against executors and administrators, it is sufficient for the defendant to allege that he posted up notifications of his appointment "in public places in the city of B," without specifying the places.

It is not necessary to set forth in such a plea to a bill in equity, that such city was the place of the testator's residence at the time of his death, where that fact appears in the bill itself.

It is sufficient in such a plea to aver, that the executors gave "bonds according to law," without saying that they were given to the judge of probate.

THIS was a bill in equity. The bill sets forth, that by an indenture made between the complainant and John Grew, "late of Boston," the defendant's testator, on January 1st, 1818, the complainant and John Grew entered into partnership for five years in the hardware business. The bill sets out the terms of the indenture, one of which was, that at the dissolution of the partnership, Grew or his representative should have the
'09 power to sell the stock and settle the business; and the partnership subsisted until it was dissolved by Grew's death on September 25th, 1821. The bill further states, that when the indenture was made, the complainant was little more than twenty-one years old, and had never transacted any mercantile business of consequence except as clerk to Grew; and that Grew brought into the partnership his old stock, which consist-

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ed in a great part of shop-worn and unsaleable articles, and charged it to the partnership at a higher price than it was worth; and that the complainant had also been injured by the mode in which the annual accounts of stock were taken and interest charged; and that if the business was fairly settled, a balance would be due to the complainant; but that no final account has ever been settled between him and Grew or Grew's representatives; that after Grew's death, the defendant and Henry Wainwright, since deceased, were executors of Grew's will; that the complainant wished them to settle the partnership business, but that they declined, and requested him to settle it and agreed to allow him a compensation for it; that he thereupon proceeded to sell the stock and collect the debts of the partnership; and that in August, 1822, during Wainwright's life, the complainant took a certain quantity of the joint effects, for which he gave three notes for 2233 dollars 33 cents each, to the executors, and on September 10th, 1824, another note for 1200 dollars, and on October 23d, 1824, another note for 973 dollars 82 cents; all which notes the complainant avers that he has paid, except one of those for 2223 dollars 33 cents, upon which the present defendant as executor, since Wainwright's decease, has sued the complainant, which suit he alleges to be still pending in this Court. The complainant further alleges, that he has paid large sums to the executors; and that on a fair settlement it will appear that they have been overpaid, and that no part of the note ought to be paid to Henry Grew as executor; but that he is indebted as executor to the complainant. The bill alleges a refusal on the part of the executors, and the survivor of them, to settle with the complainant. The prayer of the bill is, that an account may be taken of all the partnership dealings, and that the defendant may be held to account for all the moneys received by John Grew and by the executors or either of them since his decease; and 110
that the defendant may be restrained by injunction from all further proceedings in the suit at law on the note.

The defendant demurred to so much of the bill "as does not relate to his character and capacity of executor &c. as aforesaid and to the said copartnership dealings," alleging for causes of demurrer, 1. That it is apparent from the complain-

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Burditt v. Grew

ant's own showing, that he has no ground of complaint, for he does not pretend that there was ever any controversy in relation to the payments and receipts mentioned in the bill: 2. That if there is such ground of complaint, the complainant has a complete remedy at law.

As to the residue of the bill, "and the several allegations therein contained not herein before demurred to," the defendant pleaded the statute of 1791, *c.* 28, limiting suits against executors and administrators to the term of four years from the time of their accepting the trust, provided they give notice of their appointment according to law. He averred that he and Wainwright, at a Probate Court held in Boston, October 8, 1821, were "duly appointed executors of the last will and testament of John Grew then late of said Boston, merchant, deceased, and then and there duly qualified themselves as such executors by giving bonds according to law, and did thereafterwards within three months from the day last aforesaid give public notice of their said appointment and acceptance of said trust according to law, by posting up notifications of their said appointment and having taken upon themselves that trust, at public places in said city of Boston;" also setting forth a publication in the Boston Gazette, and averring that four years had elapsed since the defendant accepted the trust of executor.

March 31st, 1828.

Rand and *Morse*, for the plaintiff. The same strictness is required in pleadings in equity as at law. A plea and a demurrer cannot be used together in equity, any more than at law; and besides, it does not distinctly appear what part of the bill is pleaded to and what part is demurred to. 1 Montag. Eq. Pl. 102, 122; Beames on Pleas in Eq. 44. The plea is defective in not stating specifically a compliance with the statute provisions. Archb. Pl. 169; *Willington* v. *Stearns*, 1 Pick. 497; *Allein* v. *Randall*, Yelv. 49, 50. Instead of saying "giving bonds according to law," the plea should have stated to whom they were given. The plea is also defective in merely saying that the executors posted up notices at public places; the places themselves should have been specified. The plea does not show that the notices were posted up in the place where the deceased last dwelt, but only that they were posted up in Boston. Though the plea avers a publication in

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the Boston Gazette, it does not state that the Court directed that mode of publication.

Cooke, for the defendant, in support of the plea, cited *Brown* v. *Anderson*, 13 Mass. R. 201; *Dawes* v. *Shed*, 15 Mass. R. 6; *Emerson* v. *Thompson*, 16 Mass. R. 432; Eden on Injunc. 103. The limitation in the statute reaches suits in equity. *Bond* v. *Hopkins*, 1 Sch. & Lefr. 413; *Webster* v. *Webster*, 10 Ves. 93; Montag. Pl. 26, 27, notes; Willis on Pl. 562. It would be a great hardship to oblige the executors to open their account.

April 2d, 1829.

WILDE J. delivered the opinion of the Court. That part of the bill demurred to, relating to the contract and proceedings since the dissolution of the partnership, cannot be sustained, unless as being connected incidentally and consequentially with the concerns of the copartnership. For in the first place, this part of the bill presents no case for relief in equity, or otherwise. It is not averred that the contracts of sale were void, or unfairly obtained, nor is any fact alleged tending to impugn them. Besides, we have no jurisdiction over the subject-matter of this part of the bill, unless it can be connected with the other part of the bill relating to the dealings of the copartners; otherwise it stands on the same footing as if the sales had been made to a stranger.

The only question then is, whether the other part of the bill is barred by the statute of limitations.[1]

It is admitted that it is so barred, if the statute is well pleaded and sufficient matter is set forth in the plea, to show that due notice was given by the executors of their acceptance of their trust, according to the statute.

It is true, that in pleading, the same strictness is required in equity as at law; at least in matter of substance. Mitf. 232. But we do not find any defect in the plea, either substantial or formal, which would authorize us to set it aside. The principal objection is to the notice. The plea avers that notice was given by the executors according to law, by posting up notifications of their appointment at public places in this city,

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[1] See *Bangs* v. *Hall*, 2 Pick. (2nd ed.) 372, note 1 and cases cited; *Farnam* v. *Brooks*, 9 Pick. 243; *Johnson* v. *Ames*, 11 Pick. 182; *Andrews* v. *Sparhawk*, 13 Pick. 400.

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without however designating the particular places where the notifications were posted. We do not recommend this form of pleading, but nevertheless we cannot say it is fatally defective. The same objection was insisted on in the case of *Sewall* v. *Valentine*, 6 Pick. 276, and was overruled. Notice is averred in the words of the statute, and the averment is direct and positive. The plaintiff might have replied and traversed the fact, in which case the defendant would have been put to the proof of the notice with all its attending circumstances. The only possible use of designating the particular places of posting, is to give notice to the other party, that he might be the better prepared to contest the proof to be offered in support of the plea. But the Court have power to guard against the effects of surprise, and will exercise it on every proper occasion.

Then it is objected, that it is not averred that the deceased had his domicil at Boston at the time of his decease. But this fact sufficiently appears by the bill, and therefore such an averment is not necessary. The deceased is styled, *late of Boston*, &c. and by the facts set forth in the bill, it appears that he continued doing business here until his death.

Nor do we think the objection, that there is no direct averment that the bond was given to the judge of probate, of any avail. To aver, as is done in the plea, that the executors gave bonds according to law, is, we apprehend, sufficient.

There seems to be little reason for insisting on these niceties, as the defendant may rely on the same bar by way of answer, in which all these supposed defects might no doubt be removed; and the defendant, at the same time, might avail himself of the general statute of limitations. We think, however, that the plea, in the form pleaded, is well enough, and that it is a bar as to all the transactions and dealings between the partners; and against all claims against the executor of Grew in his character as executor.

113 That part of the bill therefore which relates to the copartnership cannot be sustained, and as the residue of the bill is clearly insufficient, the whole bill must be dismissed.

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The New England Bank *versus* Winslow Lewis *et al.*

A judgment in an action against the indorser of a note, in his favor, on a verdict which was rendered on the ground that the action had been brought before notice was given to him, is no bar to another action commenced after notice was given; and consequently such judgment is no bar to a suit in equity brought against the indorser and his assignees in order to enable the plaintiff to obtain the benefit of the assignment.

A suit in equity lies against persons to whom a debtor has assigned his property for the benefit of his creditors, by a creditor to whom the assignees refuse to pay his dividend.

If the assignee, having sufficient funds to pay the creditors preferred in the assignment, exhausts the funds by payments to other creditors whose claims are not preferred, leaving one of the preferred creditors unpaid, he is liable to pay such preferred creditor the amount of his demand, even if the misappropriation was made inadvertently.

Creditors, for whose benefit an assignment is made by a debtor, are entitled to claim dividends under it, without becoming parties to it or signifying their assent to it, when the instrument itself does not require any signature or assent on their part; and they cannot be deprived of their rights under the assignment, without a refusal or waiver of their claim under it.

A creditor's prosecuting a suit at law against the debtor, on which he had made an attachment, to final judgment, is not evidence of such a waiver.

It *seems*, that the mere declining of the president of a bank which is one of the preferred creditors in an assignment, to become a party to the instrument, is not alone sufficient evidence of a refusal of the bank to accept the assignment.

The answer of a defendant in equity stating facts which are not inquired of in the bill, is not evidence of such facts.

This was a bill in equity. The bill alleges that the defendants, Winslow and Henry Lewis, were indebted to the bank as indorsers of a note dated January 4th, 1822, signed by Eyre M. Jeffries, for 1462 dollars 50 cents, payable in six months and grace to Robert Ludlow or order, and indorsed by him and by W. and H. Lewis. The bill also alleges a due presentment and dishonor of the note, and notice to the defendants.

The bill further alleges, that on January 15th, 1824, Winslow and Henry Lewis, by indenture, conveyed their property to Alexander Townsend and Samuel Austin junior, the other 114
defendants, in trust to pay certain claims set forth in a schedule thereto annexed, in full, one of which was that of the plaintiffs, and then to divide the residue of the proceeds of the property ratably among certain other creditors; that the note has never

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been paid; that Jeffries is insolvent, and that Ludlow died in solvent; and that the plaintiffs gave notice to the trustees, of their intention to take the benefit of the provisions in the indenture in relation to their claim.

The plaintiffs further allege, that the trustees accepted the trust; and in answer to a pretence of the defendants, that the indenture was never executed and delivered to the trustees, they charge that the same was executed and delivered to the trustees and by them accepted, and that they have proceeded to sell and dispose of the property, and to apply a part of the proceeds in payment of debts which by the terms of the indenture were postponed to that of the plaintiffs, but have refused to pay the plaintiffs.

In answer to another pretence of the defendants, that the plaintiffs have no remedy, because they formerly brought an action at law against Winslow and Henry Lewis on the note, in which action judgment was rendered in favor of the defendants, the bill charges that the defence set up at the trial of that action was, that the suit, which was commenced on the day when the note fell due, was brought before notice of its dishonor had been given to the defendants, who were indorsers, and that this was the only defence, and that judgment was rendered in favor of Winslow and Henry Lewis on the ground alone that the action was brought prematurely; and the bill alleges that this judgment is no bar to an action, even at law, on the note, brought after notice was given. [See *New England Bank* v. *Lewis*, 2 Pick. 125.]

The prayer of the bill is, that the trustees may stand charged with the execution of the trust, and be ordered to pay the plaintiffs the amount of their debt.

The answers of the defendants admit the material averments as to the note, but insist that the indenture was never delivered except conditionally, if they are allowed to do so after the decision of this Court in *Ward* v. *Lewis*. [See the case in
115 4 Pick. 518.] They also urge the judgment in the suit on the note as a bar to the bill.

Townsend, in his answer, states that after executing the indenture he returned it to the Lewises, and never saw it again until the filing of the bill in *Ward* v. *Lewis*, when two parts

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were put into his hands by the Lewises as their counsel; he denies that any part of the property ever came to his hands, or that he acted as assignee; and he asserts that the trusts were never affirmed by the plaintiffs, but were disaffirmed by their suit at law; and he denies that he ever had notice that the plaintiffs intended to avail themselves of the trust, until August 25, 1825, at which time he received a written notice from their solicitor that they desired to avail themselves of the trust in the indenture, which notice was addressed to him and Austin, but which he did not communicate to Austin until April 20, 1827, supposing Austin to have received a like notice.

The answer of Austin relies upon the same facts which are stated in *Ward* v. *Lewis*, to show that the indenture was never delivered; and states that property of the Lewises was put into his possession, with which he charged himself, the particulars of which appeared in an account referred to; and that the Lewises having settled with all their creditors who had subscribed the indentures, the balance of the account was merged in his private accounts with the Lewises, which accounts have all been liquidated and paid, except 3882 dollars, the amount of the judgment against him in the suit of *Ward* v. *Lewis*, which he paid out of his own property; that he has since received of the Lewises 2820 dollars, leaving a balance of 1062 dollars due him, for which he has no security; that after the execution of the indenture, certain proceedings were had among the creditors, which are stated at large in his answer in the case of *Ward* v. *Lewis*, from which he was led to believe that the indentures were given up and abandoned, and that he acted accordingly; he further states, that shortly after he had signed the indenture, Samuel Dorr, the president of the New England bank, having called on him to examine the indenture, he asked Dorr to execute the same in behalf of the plaintiffs, which Dorr declined; and he denies that he ever received any notice that the plaintiffs intended to avail themselves of 116
the trust, until about April 20, 1827, and after the termination of the suit of *Ward* v. *Lewis*. He also insists that the judgment on the note, at law, against the plaintiffs, was a bar to this suit; and denies any trust, or that the same was ever affirmed by the plaintiffs; but alleges that the same was disaf-

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firmed and repudiated by the prosecution of the suit at law by the plaintiffs.

Shaw and *Bartlett*, for the plaintiffs, relied upon the decision in *Ward* v. *Lewis*, 4 Pick. 518, as establishing the facts that the indenture of assignment had been executed and had not been annulled.

The judgment in the former action on the note would be no bar even to an action at law, for the cause of action on the note accrued subsequently to the commencement of that suit.

It may be contended that the trustees had not reasonable notice that the plaintiffs intended to avail themselves of this assignment. But the presumption of law is, that they intended to avail themselves of it, and no notice of acceptance on their part was necessary. *Nicoll* v. *Mumford*, 4 Johns. Ch. R. 529 ; *Halsey* v. *Fairbanks*, 4 Mason, 206 ; *Brooks* v. *Marbury*, 11 Wheat. 96 ; *Shepherd* v. *M'Evers*, 4 Johns. Ch. R. 136 ; *Gregory* v. *Williams*, 3 Meriv. 582. The plaintiffs have been guilty of no laches. *Stackhouse* v. *Barnston*, 10 Ves. 466 ; *Hercy* v. *Dinwoody*, 2 Ves. jun. 87 ; *Whichcote* v. *Lawrence*, 3 Ves. 740. It is doubtful indeed, whether these trustees would be protected against this claim, even by the statute of limitations. *Wood* v. *Dummer*, 3 Mason, 320. It was their duty to notify the trust to the plaintiffs. *Dunch* v. *Kent*, 1 Vern. 260, 319.

To show that bringing the suit at law was not an abandonment of the plaintiffs' rights under the assignment, the following cases were cited. *Wake* v. *Wake*, 1 Ves. jun. 336 ; *Whistler* v. *Webster*, 2 Ves. jun. 371.

The acts of Dorr cannot be considered as a rejection of the assignment, for Dorr had no authority to execute the instrument. Besides, the acts of Dorr, as alleged by Austin, have not been proved ; which is necessary in order to affect the plaintiffs ; for allegations in an answer, of new facts in avoidance, and not being a direct denial of matter charged in the
117 bill, are not evidence, but must be supported by other proof. Cooper's Eq. Pl. 328 ; *Hart* v. *Ten Eyck*, 2 Johns. Ch. R. 62 ; *Simson* v. *Hart*, 14 Johns. R. 63 ; *Randall* v. *Phillips*, 3 Mason, 383 ; *Green* v. *Hart*, 1 Johns. R. 580.

S. Hubbard and *Townsend*, for the defendants, contended

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that the verdict and judgment in the former action on the note, were a bar to this suit. 3 Bl. Com. 376; *Ferrer's case*, 6 Co. 7; *Hitchin* v. *Campbell*, 2 W. Bl. 831; *Kitchen* v. *Campbell*, 3 Wils. 308; *Jackson* v. *Swartwout*, 8 Johns. R. 383; *Seddon* v. *Tutop*, 6 T. R. 607; *Homer* v. *Fish*, 1 Pick. 440.

The plaintiffs have lost their rights under the assignment, by their delay in acceding to it. *Lane* v. *Jackson*, 5 Mass. R. 162. The notice received by Townsend was too late, and Austin, in fact, never had notice till a long time after. Austin certainly ought not to be prejudiced by the plaintiffs' neglect, in consequence of which he has paid out all the funds. *Hunt* v. *Rousmanier*, 3 Mason, 294.

The prosecution of the suit was of itself a rejection of the assignment; and so were the acts of Dorr

April 2d, 1829

WILDE J. delivered the opinion of the Court. Several points made in this case were fully considered and determined at a former term, in the case of Ward and another against the present defendants. I shall therefore, in delivering the opinion of the Court, notice those points only which distinguish this case from the former.

And first, the defendants contend that this suit is barred by a judgment recovered by the Lewises in an action at law founded on the same cause of action set out in the bill. The plaintiffs admit, in their bill, that their action at law was founded on the same note, but not on the same cause of action. On the contrary, they aver that the judgment in the action at law was rendered solely on the ground that the plaintiffs' right of action had not then accrued, for want of notice prior to the commencement of the action. And this averment is not denied in the answers. And the rule is, that if any matter is charged by the bill which may avoid a bar to the action, it must be denied particularly and precisely in the answer. The fact however has not been denied in the argument, and it is sufficiently proved, if proof be necessary, by the report of the former action.

We are therefore to consider, whether the facts charged in 118
the bill are sufficient to avoid the bar. And we think they are. The general rule is laid down in *Ferrer's case*, 6 Co. 7;

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"when one is barred in any action &c. by judgment &c., he is barred as to that, or the like action, of the like nature, for the same thing forever." When, however, the real merits of an action have not been inquired into in a former suit, issue may be taken on the fact, the judgment being pleaded in bar. *Hitchin* v. *Campbell*, 2 W. Bl. 827. And when issue is thus taken on the fact, evidence is admissible to prove what passed at the former trial. *Seddon* v. *Tutop*, 6 T. R. 607.[1] And of course, when the fact is admitted by demurrer or otherwise, the bar must fail. It is clear, therefore, we think, that as the merits of the present suit were necessarily excluded in the former action, because no cause of action had then accrued, the judgment in that action is no bar, either at law or in equity.

We think it also equally clear, that the plaintiffs have no adequate remedy at law. It is true they might recover judgment against their debtors. But a judgment against insolvent debtors, without satisfaction, cannot be considered an adequate remedy, nor indeed any remedy. If therefore the plaintiffs are interested in the trust fund, as they claim to be, it cannot be doubted that their proper remedy is in equity.

And the principal question is, whether the plaintiffs have any interest in the trust fund.

It has been argued that they have not, because they never became parties to the assignment, and did not, within a reasonable time after the assignment was made, signify to the trustees that they assented to the provision made for them by their debtors, and intended to claim the benefit of it. It was decided in the case of *Ward*, that it was not necessary for the preferred creditors to become parties to the deed of assignment made for their benefit. The trust was created by Winslow and Henry Lewis, and the trustees, by becoming parties to the deed and accepting the trust, were bound in equity to execute it on the application of any of these creditors; and the trustees were bound to retain funds in their hands for that purpose, and not to pay other creditors unless there should be an overplus after paying the preferred creditors, or unless these

[1] See 1 Stark. on Evid. (5th Am. ed.) 222, 223; *Parker* v. *Thompson*, 3 Pick. 428; *Standish* v. *Parker*, 2 Pick. (2d edit.) 22, notes; *Wood* v. *Jackson* 8 Wendell, 44

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creditors, or some of them, should refuse to accept the provision made for them, or should waive the benefit by some act equivalent to a refusal.[1] This case therefore depends altogether on the question, whether the plaintiffs have refused the provision made for their benefit in the deed of trust, and if not, whether sufficient facts appear to amount to a waiver.

Austin, in his answer, states, that soon after he had signed the trust deed, Dorr, then president of the New England bank, called on him and requested him to exhibit the deed of trust, which was done, and that it was read by him, and that he was thereupon requested by Austin to sign and execute the same in behalf of the bank, which he declined to do. And this, it is contended, being an answer to an interrogatory in the bill, must be taken to be true unless disproved, and that no evidence to disprove it has been offered in the hearing of the case. We do not find in the bill any particular interrogatory touching this part of the answer. There is the general interrogatory touching all the matters and things alleged in the bill; and it is averred in the bill, that the plaintiffs, after the assignment in trust to Townsend and Austin, did give them notice that they were desirous of availing themselves of the trusts in their favor, and that they were ready and desirous to execute the trust deed, if they ought by the terms of it so to do; but the matter relied on by the defendants is not the proper answer to this averment in the bill; nor does it purport to be. An answer to an interrogatory must be positive and direct, and not argumentative. Now it might be true, that the president of the bank did, on one day, decline to sign and execute the trust deed, either because he might suppose it not necessary for the preferred creditors to become parties to the deed, or because he might not think himself authorized to execute the deed without consulting the other directors, and taking counsel touching the matter; and the next day, after being

[1] See *Buffum* v. *Green*, 5 N. Hamp. R. 71; *Hempstead* v. *Starr*, 3 Day, 348; *Marlborough Manuf. Co.* v. *Smith*, 2 Connect. R. 579; *Brown* v. *Minturn*, 2 Gallison, 557; *De Forest* v. *Bacon*, 2 Connect. R. 633; *Cunningham* v. *Freeborn*, 1 Edwards's Ch. R. 256; *S. C.* 11 Wendell, 240; *Russell* v. *Woodward*, 10 Pick. 415; *Brewer* v. *Pitkin*, 11 Pick. 298; *Copeland* v. *Weld*, 8 Greenleaf, 411; *Bradford* v. *Tappan*, 11 Pick. 76

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better advised, he might have offered to execute the deed as averred in the bill. The question for the defendants to answer was, whether the plaintiffs did offer to execute the trust deed; and a simple affirmative or negative would have been the proper answer. But if the defendants saw fit to go further, as they had the right to do, and aver additional matter on which they rely in their defence, they must prove the additional matter, it being traversed by the general replication. The result therefore is, that if the plaintiffs would avail themselves of the averment in the bill, that they offered to execute the trust deed, they must be held to prove it; and so on the other hand, if the defendants rely on the averment in the answer of Austin, that the president of the bank did actually refuse to execute the trust deed in the behalf of the company, they must prove the fact. Now we think there is no satisfactory proof of either averment; certainly none to prove the averment in Austin's answer, and the presumption from the evidence is pretty strong the other way; for if it were true, as averred by Austin, that soon after the trustees signed the trust deed, the plaintiffs, by their president, did disaffirm the trust in their favor, and did refuse to become a party to the deed, it would be difficult to account for the fact testified to by one witness, that so late as May, between four and five months after the execution of the deed, Austin acknowledged that the plaintiffs' debt was to be paid in preference to certain other debts. So Haskell testifies, that Austin, and also Winslow and Henry Lewis, did frequently state to him, that the debts enumerated in the schedule, to the amount of 54,653 dollars 54 cents, which included the debt now claimed, were to be paid in full from the proceeds of the property assigned. And that this sum was always deducted, when computations were made for the purpose of ascertaining the amount which would remain for other creditors.

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But it has been argued, that the plaintiffs, by electing to proceed in their action at law after the provision made for them in the trust deed, have virtually waived that provision, which it is said was made for the purpose of relieving the goods from the attachment made in that action. It is not however made a condition of the trust, that the plaintiffs should discon-

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tinue their suit, nor does it appear that the defendants in that suit either expected or wished it to be done. They insisted on their defence to the action, and eventually prevailed. Under these circumstances the plaintiffs had a right to proceed to trial, with the view of saving themselves from costs. If they had prevailed in their action, and had then elected to rely on the attachment rather than on the provision made for them in 121
the deed of trust, this undoubtedly would have amounted to a waiver and disaffirmance of the trust. But merely prosecuting the action to final judgment cannot, we think, have any tendency to show a waiver of the trust.[1]

We are, therefore, of opinion, that there is no sufficient evidence in the case to show that the plaintiffs have refused or waived the trust in their favor, and that they, therefore, have a good right in equity to claim the benefit of that trust; and that the trustees are bound to execute the trust, and to pay the plaintiffs' demand out of the proceeds of the sale of the assigned property and effects, it appearing that this fund is more than sufficient to pay all the preferred creditors.

This may operate hardly upon Austin, if he has incautiously paid away the trust fund to other creditors without taking an indemnity. But he must certainly be answerable for any misappropriation of the trust fund, and if he has no indemnity, the loss must fall upon him, unless he can recover back the money paid to the other creditors as money paid by mistake, or can procure indemnity from the Lewises. It is sufficient for the plaintiffs to show, that the trust fund in the hands of Austin was fully equal to the amount of the claims of the preferred creditors, and this appears by the account stated and annexed to the answer.

[1] See *Coverdale* v. *Wilder*, 17 Pick. 178.

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THOMAS K. JONES, Appellant, &c.

April 3d. THIS was an appeal from a decree of the judge of probate for the county of Suffolk, authorizing an action to be brought in his name for the use of one Wood, upon an administration bond signed by the appellant as a surety. But the *Court* now said that a decree was not necessary in such a case, and that an appeal would not lie. The judge of probate is not required to determine whether there is a good cause of action. If he consents that the bond be put in suit, that is sufficient. On the other hand, when he refuses to deliver over a
122 bond to be sued, it may be proper for him to make a decree, in order that the party aggrieved may have an opportunity to appeal. *Appeal dismissed*

HORACE BAKER *versus* OTIS BRIGGS.

A verdict will not be set aside as against evidence where there is evidence on both sides, unless it is manifest that the jury in giving their verdict must have mistaken or abused their trust.

Where a note is made by A payable to B, and indorsed by C at the time it is made, C becomes a promiser on the note, and may be declared against as such.

It *seems*, that from the form of the note, without any other evidence, C will be regarded as surety to A.

In an action by B against C as a promiser of such a note, the declarations and admissions of A are not admissible against C, for A is himself a competent witness.

A creditor who has his debt secured by a surety, and has also property pledged to him by the principal debtor as security, is bound to keep the property for the benefit of the surety as well as himself, and if he surrenders the property without the knowledge and consent of the surety, he loses his claim against the surety to the amount of the property given up.

A surety, who is sued alone, is entitled in this State to the same defence in law which he would have in equity.

Whether the surety can set up such equitable defence when he and his principal are sued in a joint action, *quære*.

If the creditor informs the surety that his debt is paid, and the surety thereby loses an opportunity of securing himself against his principal, the surety is discharged, although the debt was not in fact paid, and the creditor acted under a mistake in the declaration which he made.

Where the creditor received from the principal debtor the note of a third person to a larger amount than the debt, and gave a receipt which stated that the note was received "in security for all notes signed" by the debtor, it was *held*, in an action

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against the surety, that parol evidence might be received to show that the note of the third person was received in payment by the creditor, and with intent to discharge the debtor and his surety.

ASSUMPSIT to recover the amount of a promissory note. One of the counts was against the defendant as maker of the note.

At the trial, before *Parker* C. J., the plaintiff gave in evidence the following note, — "Boston, August 1st, 1825. For value received I promise to pay Horace Baker, or order, the sum of one hundred and sixty dollars in six months from date with interest. Isaac Ryan." On the back was the name "Otis Briggs." The signatures of Ryan and Briggs were admitted.

S. Presbrie, a witness called by the defendant, testified that some time, he believed in the spring of 1826, Baker said that he had been to Bridgewater, to see Isaac Ryan. The witness 123
asked, "What success?" Baker replied, that he had got his pay of Ryan, and Briggs was clear. Witness inquired if he was clear of both notes. Baker said that he was; that he (Baker) had purchased of Ryan a note of one Thayer at more than six per cent discount, and that there was a balance due to Ryan. The witness did not, at the time, communicate this conversation to Briggs.

A. Richardson was then called by the plaintiff, to prove, that in the summer of 1826 he called on Ryan at the plaintiff's request, and that Ryan then showed him a receipt, which Ryan stated was given by the plaintiff on receiving Thayer's note of him. Of this receipt the witness took a copy, which the plaintiff offered in evidence, having given notice to the defendant to produce the original; but there being no evidence of a demand on Ryan for the original, the copy was rejected.

The plaintiff then called Ryan, who testified that in May, 1826, he had a note for 500 dollars, signed by Libbeus Thayer, which he (Ryan) indorsed to the plaintiff, taking a receipt from him, which expressed the true bargain between himself and the plaintiff in relation to the note; that he lost this receipt in 1827, but that Richardson took an exact copy of it, in September, 1826.

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The defendant introduced evidence to discredit Ryan's testimony.

Richardson then testified, that on September 5th, 1826, Ryan exhibited to him a receipt purporting to be signed by Baker, and that the witness took an exact copy, and forwarded it to the plaintiff in Boston. A copy handed to the witness, was stated by him to be the one which he had taken. It is as follows, — "Boston, May 9th, 1826. This is to certify, that Horace Baker holds a note of five hundred dollars, signed by Libbeus Thayer of Randolph, in security for all notes signed by Isaac Ryan of West Bridgewater. Horace Baker."

L. Howard, a witness for the defendant, testified, that in June, 1826, Baker, Briggs and one Keith came to see Ryan. Ryan said, "You have no right of action against me; why do you trouble me?" Baker said that he had a right. Ryan replied, "I have a receipt in my pocket which cuts off all right
124 of action against me and Mr. Briggs." The witness heard Ryan read the paper. He remembered the words "all demands signed by Otis Briggs and Isaac Ryan." Baker said that he did not deny the receipt, but that it was only intended for security, and he had found it no security. Baker asked the witness where the horse and gig were. The witness said that he had bought the horse. Baker said that he had a bill of sale of them, and that he took them on a note which he had against Ryan and Briggs. The witness asked why he did not keep possession. Baker said that he thought he could get his pay without, from Thayer's note, but it got to be doubtful. At this time Ryan was able to pay 100 dollars. He had sold the gig for 60 dollars, and the horse was worth 200 dollars, on which the witness had advanced 100 dollars. Thayer's circumstances were considered good before his failure, and so were Ryan's. Thayer's note was not due at the time this conversation took place.

Keith testified, that he heard the paper read by Ryan, and that it sounded like the one testified to by Richardson as a copy, and that he did not recollect the name of Briggs in it; and that in this interview, and during all the time Baker and Briggs were together, they seemed equally interested to get security of Ryan.

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There was other testimony, which is not important, except as regards the question of the verdict's being against the evidence. Baker v. Briggs.

The judge instructed the jury, that although Briggs, by the form of the contract, was properly declared against and was liable as maker of the note, yet as it was evident that the debt was Ryan's, Briggs was so far to be considered as a surety as to be entitled to any defence which might grow out of that relation: That even if they should believe that the copy of the receipt in the case is a true copy, yet if the evidence satisfied them that Thayer's note was taken in payment and with intention to discharge Briggs and Ryan from the note in suit, they might find for the defendant, notwithstanding the terms of the receipt: And that if they did not believe the copy to be true, then they would judge from the evidence, whether Thayer's note was taken absolutely in payment or not: Also, that if they believed that the plaintiff told the defendant that the note in suit was paid, intending to be so understood, and 125
that the defendant was clear of it, and that in consequence of this declaration the defendant lost any opportunity to secure himself against Ryan, the defendant would be discharged, although there was not in point of law a payment by the transaction in relation to Thayer's note: And that if the plaintiff had had in his possession personal property of Ryan as security for the note in suit, and suffered it to pass back into the hands of Ryan without Briggs's consent or knowledge, Briggs would be discharged from his liability.

The jury having found a verdict for the defendant, the plaintiff moved for a new trial on account of these instructions, and because the verdict was against evidence.

Morey, for the plaintiff. Briggs was an original promiser on the note. *Hunt* v. *Adams*, 5 Mass. R. 358; *Carver* v. *Warren*, 5 Mass. R. 545; Big. Dig. (2d ed.) 637; *Hemmenway* v. *Stone*, 7 Mass. R. 58. There is no evidence to show that Ryan was principal and Briggs surety; nor can that relation between them be inferred from the form of the note. *Elliott* v. *Lyall*, 3 Call, 272, 278. If it does not appear from the instrument itself that Briggs was a surety, he cannot, as it regards the promisee, claim any privilege arising from that *March 4th.*

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relation. *Hunt* v. *The United States*, 1 Gallison, 33, and cases there cited; *Townsend* v. *Riddle*, 2 New Hamp. R. 448. Even if it did so appear, still it seems that the promisee owes no other duty to the surety than he does to the principal. *Frye* v. *Barker*, 4 Pick. 382; *Hunt* v. *Bridgham*, 2 Pick. 581.

Ryan's declarations were admissible evidence against the defendant. *Frye* v. *Barker*, 4 Pick. 382; *Hunt* v. *Bridgham*, 2 Pick. 581; *Howard* v. *Cobb*, 3 Day, 309; *Wood* v. *Braddick*, 1 Taunt. 104; *Martin* v. *Root*, 17 Mass. R. 227; *Grant* v. *Jackson*, Peake's Cases, 203; *Nichols* v. *Dowding*, 1 Stark. R. 81; *Whitcomb* v. *Whiting*, 2 Doug. 652; Phil. Ev. 75, *ch.* 5, *sect.* 4. A copy, which a joint contractor with the defendant admitted to be a true copy of the original in his hands, or parol evidence of the contents of the original, is admissible, the plaintiff having given notice to the defendant to produce the original. 1 Stark. on Ev. 358; *Baldney* v. *Ritchie*, 1 Stark. R. 338.

126 The admissions of the plaintiff, that he had got his pay, cannot preclude him from showing that he was mistaken, and that he had not got his pay.

Parol evidence was not admissible to contradict the written agreement which Ryan received from the plaintiff when he passed Thayer's note to the plaintiff. 3 Stark. on Ev. 999, 1002, 1009; *Flint* v. *Sheldon*, 13 Mass. R. 443; *Robinson* v. *M'Donnell*, 2 Barn. & Ald. 134; Phil. on Ev. 495, 496, *ch.* 10, *sect.* 2; *Munford* v. *M'Pherson*, 1 Johns. R. 414; *Stevens* v. *Cooper*, 1 Johns. Ch. R. 425; *Lane* v. *Neale*, 2 Stark. R. 105; *Clark* v. *M'Millan*, 2 Carolina Law Repository, 265; *Hoare* v. *Graham*, 3 Campb. 57; *Hogg* v. *Snaith*, 1 Taunt. 347.

Merely receiving property of the principal and suffering it to pass back again into his hands, does not *ipso facto* discharge the surety.

The verdict was against evidence, or rather *without* evidence, on several points submitted to the jury.

Rand, for the defendant, as to the rights of sureties, cited *King* v. *Baldwin*, 2 Johns. Ch. R. 557; *Hayes* v. *Ward*, 4 Johns. Ch. R. 129.

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PARKER C. J. delivered the opinion of the Court. It is moved to set aside this verdict, on the ground that it is against evidence, notwithstanding there was a great deal of evidence on both sides, so contradictory that on a former trial the jury could not agree, and on this trial it was the subject of elaborate argument, and scrupulous comparison of testimony. If under these circumstances a verdict can be set aside as against evidence, no action can be tried which may not be brought in review before the Court upon the facts, and the trial by jury will be virtually superseded. Perhaps no cause which really has two sides to it, can be determined without a serious belief in the party losing, and perhaps in his counsel, that the verdict was wrong and against the weight of the evidence. But disputes must be settled and finished, and our law and constitution having given the ultimate decision upon the facts to the jury, to set aside their verdict, unless in extraordinary cases where it is manifest that they have mistaken or abused their trust, will be 127 to usurp a power which has been carefully and properly withheld from us.[1]

The present case affords an illustration of the principle we feel bound to adhere to. [The Chief Justice here examined the evidence on the question whether the note of Thayer was taken by the plaintiff in payment of the note in suit, or only as a pledge, and concluded by saying that the verdict was not unsupported by the evidence, or so manifestly against the weight of it as to justify the Court in interfering.] There are some questions however of a legal character, which the plaintiff's counsel have very properly raised, and which we are bound to decide.

First, it was objected that the declaration of Ryan as to the terms of the receipt, and of his agreement with the plaintiff in regard to Thayer's note, ought to have been admitted, because he was a party to the contract with the defendant, and the admissions and confessions of one is evidence against the other. We believe it to be a sound principle, that the sayings and declarations of one who is a competent witness in a cause, are

[1] See *Douglass* v. *Tousey*, 2 Wendell, 352; *Smith* v. *Hicks*, 5 Wendell, 48; *Jackson* v. *Loomis*, 12 Wendell, 27; *Laflin* v. *Pomeroy*, 11 Connect. R. 440.

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not to be admitted in evidence to charge another, upon the general ground, that they are but hearsay evidence, and are not the best evidence which the case affords. Now Ryan was a competent witness; he was equally interested towards both parties; neither party could object to him if offered by the other. He was answerable upon the note himself to the plaintiff, and, by the form of the contract, he was answerable to Briggs if Briggs was compelled to pay. His deposition was in the case, and he himself was within the city when the cause was tried. We think it impossible to suppose, that under these circumstances his declarations should be received to charge Briggs on the subject to which those declarations referred, viz. the terms of the receipt he had taken from the plaintiff and the nature of his agreement with him. In the cases cited by the plaintiff's counsel in support of this objection, the confessions or admissions received were of one of the parties in the action, and where necessarily they must be admitted, and being admitted they are to affect both. But in this case the plaintiff has chosen to sever the two parties to the note, leaving one out of the writ who is a competent wit-
128 ness; and this puts him upon the footing of other witnesses, so that his declarations, not under oath, cannot be admitted to affect the other party to the contract. *Gibbs* v. *Bryant*, 1 Pick. 118.

Besides, Ryan himself was offered as a witness by the plaintiff, and testified in the cause, so that the plaintiff had the full benefit of his knowledge, and therefore cannot complain that his declarations were rejected. All the cases cited from our reports to sustain this objection, are where the admissions or confessions proved were made by parties to the action as well as to the contract. And we do not find in any of the other cases cited, that the principle is extended further, except where the admission offered is to take the case out of the statute of limitations, and in such cases it seems to be generally admitted, that the acknowledgment of one party to the contract, though not sued, is binding upon all the others. There may be other cases in which the acknowledgment of one joint contractor will bind the others; but we know of none like the present, in which Ryan and the defendant between themselves are not joint

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contractors, but Ryan is the debtor, and the defendant is the surety, so that they are not *quasi* partners in the transaction. We do not think that on this ground the verdict ought to be set aside.

Again it is objected, that in summing up the case to the jury, the defendant was treated as a surety, and therefore as entitled to some grounds of defence which would not affect Ryan if the suit were against him; for it is said the law knows no difference between principal and surety, and whatever will charge the principal will charge also the surety.

In the case *The People* v. *Jansen*, 7 Johns. R. 337, it was held by the court, that whatever would discharge a surety in equity, would be a good defence at law; and this same position was advanced by Lord Loughborough in the case of *Rees* v. *Berrington*, 2 Ves. jun. 542. The same principle was adopted by this Court in the case of *Boston Hat Manufactory* v. *Messinger*, 2 Pick. 223.[1] The only difficulty seems to be in separating the principal and surety where they are sued as joint contractors, and where they are obliged to plead jointly, as in case of joint or joint and several promisors or obligors; for in such case, at law, it would seem they must stand or fall together, and this was probably the reason, as suggested by Lord Loughborough, of resorting to chancery for the relief of sureties. 129

Where the surety, or his representatives, are sued alone, as was the case in *The People* v. *Jansen*, and as is the case in this action, no such difficulty occurs, and it would be idle to render judgment against a defendant, who, by principles of law administered in a court of equity, would have a right to an injunction against the party claiming to enforce such judgment. In this Commonwealth, where there is no power to award an injunction against proceedings at law, and where whatever equitable jurisdiction exists is exercised by the same tribunal, the absurdity of driving the party for relief to another process is still more apparent.

Now it seems to be a well settled principle in equity, that a

[1] 2 Pick (2d edit.) 235, note 2 and cases cited; *Commercial Bank* v. *French*, 21 Pick. 488; *Commonwealth* v. *Haas*, 16 Serg. & Rawle, 252; *N. York State Bank* v. *Fletcher*, 5 Wendell, 85.

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creditor who has the personal contract of his debtor, with a surety, and has also or takes afterward property from the principal as a pledge or security for his debt, is to hold the property fairly and impartially for the benefit of the surety as well as himself, and if he parts with it without the knowledge or against the will of the surety, he shall lose his claim against the surety to the amount of the property so surrendered.

In the case of *Hayes* v. *Ward*, 4 Johns. Ch. R. 129, this doctrine is fully established. The Chancellor says, "There would be much equity in the plaintiff's case, if it should finally appear that the defendant had by his own act rendered the adequate security, which he took from the principal debtor, illegal and void. The very taking of that security by him may have excited confidence in the surety, and lulled him to sleep, and deprived him of taking other and sound security, for his own eventual responsibility, until it was too late, and the rights of third persons had intervened."

The learned chancellor drew his principle from the great source of equity, the civil law, and he cites many authors to support it; but it is a principle of natural justice also, and therefore ought to be recognised and enforced by the common law. *Law* v. *E. I. Co.* 4 Ves. 829, and *Praed* v. *Gardiner*, 2 Cox, 86, are strong in support of this point.[1]

130 There are also cases at common law of the same import. In the case of *Commonwealth* v. *Vanderslice*, 8 Serg. & Rawle, 457, this principle was adopted, and the judge who delivered the opinion of the court says, there is no clearer rule in equity, than that where the creditor has the means of satisfaction in his hands and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety can never be called on. And in a subsequent case, *Lichtenthaler* v. *Thompson*, 13 Serg. & Rawle, 157, the same principle is acted on; and indeed carried somewhat further, for it is said by the court, that when the creditor has the means of satisfaction actually or potentially in his hands, and does not choose to retain it, the surety is discharged.

[1] See Theobald Prin. and Surety, 142 *et seq.*; *Law* v. *Smart*, 5 N. Hamp R. 353.

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With regard to the question, whether the defendant was in point of fact surety or not, it seems that it was not raised at the trial, any further than to show that he was properly declared against as an original promisor.

The note was made by Ryan to the plaintiff, and the name of the defendant written on the back. Supposing this was done when the note was made, (and there was no evidence to the contrary,) according to several decisions it was right to declare against him as promisor;[1] but still he stood in relation to Ryan as a surety, and was entitled to any advantages belonging to that character, as he would if his name had been put on the face of the note, when he might prove that he was only surety, and if the creditor had done any act which could in law discharge a surety, he might prove that in his defence.

Mere delay or negligence to call upon or compel the principal to pay, would not give the surety a defence, but acts done which would tend to prejudice him, or deprive him of the power of obtaining indemnity, would; as appears by the case of *Hunt* v. *Bridgham*, 2 Pick. 583.[2]

It is said there was no evidence in the case tending to show that Briggs was a surety. But the form of the note was some evidence. The conduct of the plaintiff in obtaining security of Ryan alone on his horse and gig, the declaration of the plaintiff that Briggs was clear of the note, all had that tendency; and it was not put to the jury, because it was taken for granted, in the course of the trial, that such was the relation between Ryan and Briggs. By my minutes of the trial it 131
appears, that the defence was opened by stating, 1. that the note was paid by Ryan; 2. that though by the form of the contract the defendant was chargeable as promisor, yet he was in fact surety for Ryan, and that payment or security given by the principal would discharge him; and in summing up the evidence by the counsel for the defendant, stress was laid upon all the circumstances which tended to discharge him as surety. The plaintiff's counsel, in his closing argument, did not deny that such was the relation of Briggs, but insisted he was not-

[1] See Bayley on Bills, (2d Am. edit.) 47, 48.

[2] 2 Pick. (2d edit.) 585, notes and cases cited; *Hage* v. *Penn*, 1 Bland. 30

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withstanding liable, unless the note was actually paid. In this state of things, I charged the jury. Probably, if the counsel who argued the cause to the jury had been present at this argument, this point would not have been insisted on. At any rate, we think it cannot now be taken advantage of.

The jury were instructed, that if they believed the plaintiff told the defendant that the note in suit was paid, intending to be so understood, and that the defendant was clear of it, as testified by the first witness, and that in consequence the defendant lost an opportunity to secure himself against Ryan, the defendant would be discharged, though in point of law the transaction in relation to Thayer's note was not a payment. We think the charge in this respect was legally correct. It is said there was no evidence, that any such consequence as is supposed, followed; if so, it is not to be presumed that the jury found for the defendant on this point.

As to the conclusiveness of the receipt, the very question was, what did the receipt purport. It was only collateral matter, and therefore capable of being explained. The objection to parol evidence does not apply, where it is "offered, not for the purpose of contradicting or varying the effect of a written contract of admitted authority, but where, on the contrary, it is offered in order to *disprove* the legal existence or rebut the operation of the instrument." 3 Stark. Ev. 1015. "In general, where a written document is given in evidence as containing an admission by the adversary, parol evidence is admissible to explain it, or to show that it originated in mistake." Ibid. 1020.

132 It is also objected, that the jury were instructed, that if the plaintiff had in his possession personal property of Ryan, which he held as security for this note, and suffered it to pass back into the hands of Ryan without the consent or knowledge of Briggs, the latter would thereby be discharged of his liability. This was certainly right, for such conduct would be a fraud upon a surety. It is said that a creditor may exercise his discretion and surrender one species of security for another, or if he has an excess of security, he may give up a part Undoubtedly he may, but it is at his own risk. If the part he retains fails, the loss ought to be his own. Fair dealing re-

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quires that he should consult the safety of the surety when he has the means in his hands. It is denied that the horse and gig were ever in the actual possession of the plaintiff, but this was a fact for the jury to decide. The witness asked him why he did not keep possession, and instead of denying that he had had possession, he gave a reason for parting with it.

The cases in 1 Gallison, 33, and 2 New Hamp. R. 448, were cited to maintain the position taken by the plaintiff's counsel, that the character of surety cannot be set up, unless it appears on the instrument itself, that the party signed as surety. Neither of the cases goes that length. That in Gallison suggests it as matter of doubt. The case in New Hampshire also speaks hypothetically; admitting by implication, that if the plaintiff knew by the form of the contract, or otherwise, the fact, that the defendant was surety, the objection would be avoided. But this point was not necessary to the decision of either of the cases, and is not adjudicated.

Upon the whole matter, therefore, we think the verdict is right, and that judgment must be rendered for the defendant thereon.

COMMONWEALTH *versus* ALCOTT KENNARD *et al.* 133

If an officer would take goods belonging to A and in A's possession, upon a writ against B, A may maintain his possession by force, in the same manner as he might against any trespasser who is not an officer.

INDICTMENT against Kennard and two others. The first count is for a common assault and battery upon one Smith. The second count alleges, that on October 2, 1826, by virtue of a writ of attachment, James Dennie, a deputy sheriff, attached certain goods and placed them in the custody of Smith, and Smith being lawfully in possession of them under the authority of the deputy sheriff, the defendants on the same day assaulted and beat Smith, and with force and a strong hand deprived him of the custody and possession of the goods.

Kennard, as to whatever is against the peace, pleads not guilty; and as to the residue of the offence charged, he pleads,

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that Brodhead, one of the defendants, and one Coolidge, before and at the time when the offence is supposed to have been committed, were possessed of a certain shop, and of certain goods, being the same goods mentioned in the indictment, which were the proper goods of Brodhead and Coolidge, and being so possessed thereof, Smith, on, &c. was unlawfully in the shop, against the will of Brodhead and Coolidge, and with a strong hand kept them out of possession of the shop and of the goods, and that Brodhead requested him to depart from the shop and to give up the goods to Brodhead and Coolidge, which he refused to do; whereupon Brodhead requested Kennard to aid him in the defence of the possession of the shop and goods, and thereupon in defence of the shop and goods, they gently laid their hands upon Smith and removed him from the shop and from the goods.

Replication, *de injuria sua, &c.*

Verdict, guilty in manner, &c. and of his own wrong, and without any such cause, &c.

At the trial, before the chief justice, it appeared, that Dennie, on the 2d of October, 1826, having a writ of attachment in favor of Lambert & Patterson against one Motley, went with Lambert, soon after sunset, to the shop which had been
134 occupied by Motley, and there found goods which he attached. Dennie left Smith in the shop, directing him to keep possession by virtue of the attachment. In the course of the evening Smith was put out of the shop by force, by direction of Brodhead, Kennard assisting by Brodhead's request. No more force was used than was necessary to put Smith out of possession, and no unnecessary harm was done to him, though he was, probably without design, slightly hurt in the arm.

Kennard offered to prove, that previously to the attachment, Motley had assigned the goods, for the benefit of his creditors, to Coolidge and Brodhead, and that they immediately took possession of the goods, and appointed an agent to take charge of them; that this agent was in the shop, claiming to hold the goods in behalf of his principals, during the whole time that Smith was there; and that he informed Dennie, at the time of the attachment, that the property belonged to Coolidge and

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Brodhead. The execution and validity of the assignment were admitted.

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Evidence of these facts was rejected, on the ground that they did not constitute a justification; and the verdict was thereupon taken by consent, subject to the opinion of the whole Court.

March 5th.

Rand and *H. H. Fuller*, on the point that where an officer misapplies his precept, he is a trespasser, cited 1 Chit. Pl. 170, 129, 185; *Bell* v. *Oakley*, 2 Maule & Selw. 259; *Money* v. *Leach*, 1 W. Bl. (2d ed.) 555, and 563, note; *S. C.* 3 Burr. 1742; *Sanderson* v. *Baker*, 2 W. Bl. 832; *S. C.* 3 Wils. 309; *Morgans* v. *Bridges*, 1 Barn. & Ald. 647; Impey's Sheriff, 437, 438; *Ackworth* v. *Kemp*, 1 Doug. 40. On the point that a person, being the owner and in possession of goods, has a right to use force in order to keep possession, 1 Chit. Pl. 492; *Weaver* v. *Bush*, 8 T. R. 78; 1 East's P. C. 406, *c.* 8, § 1. And on the point, that an officer exceeding his authority is situated like any other wrong-doer, 1 Russell on Crimes, 722, 732, 743, 520, 522, 523; *The King* v. *Osmer*, 5 East, 304.

J. T. Austin, for the Commonwealth, admitted that where an officer wantonly abuses a legal process, he may be resisted, but where, acting in good faith, he merely misapplies it, the case is different. Here there was no impropriety in the conduct of the officer. It was his duty to make the attachment. 135
A creditor may require the officer to attach any property which he shall point out to the officer, and if the officer is in doubt whether it belongs to the debtor, he may require an indemnity from the creditor. *Marshall* v. *Hosmer*, 4 Mass. R. 63; *Bond* v. *Ward*, 7 Mass. R. 123. The creditor may indemnify him against pecuniary loss, but he cannot against a personal injury; it follows, that the owner of the goods has no right to use violence against the officer. It is said that the party claiming to own the goods, has not a perfect remedy, if he is put to an action; but this is contrary to the theory of the law. The government has undertaken to secure the public by requiring the sheriff to give bonds. The doctrine of trespass, as generally applied in the case of an officer, is a fiction of law, for the purpose of trying the question of title.

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April 2d.

PARKER C. J. delivered the opinion of the Court. The validity of the assignment of the goods which had been taken by the officer, over which Smith, the prosecutor, was placed as keeper, being admitted, and the assignees being in actual possession, having a servant in the shop, with the care of the goods, when the officer entered, this becomes a common case of an attachment of the goods of A on a writ against B; so that the officer, in making such an attachment, would undoubtedly be a trespasser.

The question then is reduced to this; whether the owner of goods which are in his actual possession, may not lawfully defend his possession of them against a seizure or an attachment by an officer, who comes to take them on a precept against another person, who has no right or interest in the goods.

Certainly the officer in such case would be a trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery, or false imprisonment, by one who is arrested on a writ or warrant against another person. In such case there is no authority for the arrest, and the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass
136 by the person arrested, will justify any resistance which may be necessary to defend his personal liberty, short of injurious violence to the officer.

We cannot distinguish between an officer who assumes to act under a void precept, and a stranger who should do the same act without any precept; for a command to arrest the person or seize the goods of B, is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and considering that in all cases of doubt the officer may require indemnity before he executes his

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precept, the hardship is imaginary. *Marshall* v. *Hosmer*, 4 Mass. R. 63; *Bond* v. *Ward*, 7 Mass. R. 123.

It is said that the owner of goods seized or attached on a precept against another, has legal remedies by action of replevin, trover, or trespass, and therefore ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and so the creditor may be disabled from obtaining satisfaction. Such a mischief may happen; but it is not a fair argument against the existence of a right, that it may be abused. If the right did not exist, great abuses might come from the power in officers to take any person's property upon suspicion or suggestion that it belongs to the debtor, and the owner might be driven to a replevin, in which he must give bond with surety, or to his action for damages, in which the expense may consume the value of the property.

But it is again said, that the rule sought to be established by the defence, will deprive creditors of the power of trying the question of property, in cases where there may be grounds to believe that it is covered by the person in possession claiming to be the owner. But the creditor is not without a legal remedy. He may have an action on the case for interrupting unlawfully his attachment. The officer may have an action of trespass, if the goods are taken out of his possession. And the trustee process will compel the possessor to make full disclosure of his right to hold. And besides all this the party is 137
liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty.

It will be recollected, that this is a criminal prosecution against persons who were in actual possession of the goods, being the acknowledged owners, or their servants to whose care they were committed; that they did nothing more than defend, with no more than necessary force, their possession. This decision, therefore, will form no precedent for cases which may be differently circumstanced. *Money* v. *Leach*, 1 W. Bl. 555; *Ackworth* v. *Kemp*, 1 Doug. 40; *Sanderson* v. *Baker*, 2 W. Bl. 832.

We have had no authorities cited on the part of the Commonwealth, which have any tendency to show that the owner

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and possessor of goods may not defend them against an officer who comes to seize them as another person's. That a man may defend his person, his lands, or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colorable, and the claim of property fraudulent, if backed by the creditor's orders, or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept.

There are cases which show that if an officer, having a precept against a person privileged from arrest, shall arrest him, he will not be a trespasser. But in such case he is commanded to arrest the particular person, and is supposed to know nothing of the privilege; the party therefore shall be held to apply for his discharge to the court having jurisdiction of the matter.

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138 COMMONWEALTH *versus* BARNARD BRICKETT.

A person having become bail in another State in the Union, may take the principal in this State.

SAMUEL THOMPSON of Medford was brought before the Court upon a writ of *habeas corpus* directed to Barnard Brickett. By the return it appeared, that a suit was brought in Vermont, before a justice of the peace, by William Brock against Thompson, in which Thompson was arrested and Brickett became his bail; that a judgment was rendered against Thompson; and that Brickett took him at Medford for the purpose of removing him to Vermont, to deliver him up there in discharge of Brickett as bail.

In Vermont, the person becoming bail in a civil action, indorses his name on the writ, and the officer delivers to him a bail-piece; and when he desires to take the body of the principal, the bail-piece is sufficient evidence to entitle him to a warrant from any judge &c. to take the body.

March 3d. *J. Tufts* contended, that taking Thompson here, in a civil suit, by virtue of the laws of Vermont, was a violation of our

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State sovereignty. Const. U. S. *art.* 4, § 2, and Amendments, *art.* 10; 1 Kent's Com. 36, 293, 364; Vattel, *bk.* 1, *c* 18, § 203, and *bk.* 2, *c.* 7, § 79, 83, 93.

But we rely on the *habeas corpus* act, (*St.* 1784, *c.* 72,) the 10th section of which provides, "that if any person shall transport, or carry, or cause to be transported or carried, any subject of this Commonwealth, or other person lawfully residing and inhabiting therein, to any part or place without the limits of the same, by land or water, without his consent or voluntary agreement; or in order to remove such person from one part of the State to another part of the same, except for the purpose of defending the same in time of war, agreeable to the constitution, or except such person be sent by due course of law, to answer for some criminal offence committed in some other of the United States of America," every person so offending shall be punished, &c. Since in the case of criminals escaping into this State, application must be made to the executive authority for liberty to remove them, and it is a violation of our territory to take them away by force, *a fortiori* is it so in a civil case.

For a definition of *bailment*, see Lambard's Eiren. *bk.* 3, *c.* 2. 139

Fletcher, for the respondent. This is not a question of jurisdiction. The respondent does not come here with any process from Vermont. It is the case of a particular relation, like those of husband and wife, parent and child, master and apprentice; which are binding everywhere. If there can be any doubt whether this relation, if contracted in a foreign nation, would be enforced here, certainly there can be none when it is contracted in another of the United States. Const. U. S. *art.* 4, § 2; *Respublica* v. *Gaoler of Philadelphia*, 2 Yeates, 263; *United States* v. *Bishop*, 3 Yeates, 37; *Respublica* v. *Arnold*, ibid. 263; *Nicolls* v. *Ingersoll*, 7 Johns. R. 145; *Sheers* v. *Brooks*, 2 H. Bl. 120; *Bean* v. *Parker*, 17 Mass. R. 604; *Commonwealth* v. *Griffith*, 2 Pick. 11; 1 Swift's Dig. 322; 3 Dallas, 375, note; 4 Cowen, 512, note; 4 Inst. 177; *Fisher* v. *Fallows*, 5 Esp. 171; *Ex parte Gibbons*, 1 Atk. 237; *Anonymous*, 6 Mod. 231.

The laws of Vermont provide that the bail shall have a warrant from any judge or justice of the peace, to take the princi-

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pal, but as there is no such provision in our statutes, no warrant is necessary here.

The *St.* 1784, *c.* 72, § 10, must refer to an unlawful transportation. See the preamble and § 12. And here *was* a "voluntary agreement" on the part of Thompson.

Rand, in reply. The relation of principal and bail does not depend on contract, but on jurisdiction. The bail is allowed to take the principal, because the latter is in the custody of the court, or of the law, and if he goes beyond the jurisdiction of the law, the bail cannot pursue him.

But if the right of the bail depended in Vermont upon contract, the *lex fori* must give the *remedy*. Now by our law there is no remedy in such a case, where no bond has been taken. This is an attempt to enforce a remedy given by the laws of Vermont; but it is clear that the authority of the courts and of the remedial laws of Vermont can have no force here.

The 10th section of the *habeas corpus* act is decisive. It expressly includes such cases. With the exception of cases
140 provided for by the constitution and laws of the United States, it makes no distinction between a taking for one cause or another. So far as that constitution does not take from the State the power to legislate upon this subject, the State have a right to enact what they please. They have chosen to make the transporting of any citizen out of the State against his consent or without his voluntary agreement, unlawful, and a penalty is incurred if the offence is committed. An attempt to commit it would consequently be a misdemeanor.

April 2d. PUTNAM J. delivered the opinion of the Court. By the common law the bail has the custody of the principal, and may take him at any time, and in any place. 2 Highmore, 199, and the cases there cited. The taking is not considered as the service of process, but as a continuation of the custody which had been, at the request of the principal, committed to the bail. The principal may therefore be taken on Sunday. The dwellinghouse is no longer the castle of the principal, in which he may place himself to keep off the bail. If the door should not be opened on demand at midnight, the bail may break it down, and take the principal from his bed, if that

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measure should be necessary to enable the bail to take the principal. If the principal should be arrested at the suit of the queen on civil process, while in the custody of the bail, the principal shall be turned over to the bail. In the comprehensive words used by the court in 6 Mod. 231, case 339, the bail have the principal always upon the string and may pull it when they please, to render him in their own discharge. The bail may seize the principal himself or depute an agent to take him. *Nicolls* v. *Ingersoll*, 7 Johns. R. 145.

In Vermont, in addition to the bail-piece, the law provides that the sureties shall have a warrant from any judge or justice, and another directed to the sheriff and his deputy. And at common law the bail may command the assistance of the sheriff and his officers.

Such would have been the liability of the principal, if he had remained in his own State. Has he discharged himself from his liability and duty by coming within the limits of Massachusetts? If he has, the State has indeed become as a city of refuge, more effectual than his own dwellinghouse.

It is contended that the liability does not arise from the contract. We think it does, and the remedy is to be according to our laws. Now there is no statute provision here for the granting of a warrant for the bail. He is to act here, if at all, under the provisions of the common law. And we are satisfied that they are sufficient. The obligation which the principal entered into to the bail, was not discharged by stepping across the line of his State. The relation between bail and principal exists here as it did in Vermont, in full force. Why may not the bail enforce his common law right? 141

It is contended that the laws of Vermont are of no force here. That is true, and would be as true in regard to any other obligation or contract made in Vermont by one who should afterward come here. The obligation rightfully made there would be enforced here according to our known rules.

But we are particularly referred to the *habeas corpus* act, § 10, as decisive of the case. Now that would apply to the case of a master belonging to Berkshire who should seize his runaway apprentice or servant in this city. Other cases might be put; but try the statute by that. The apprentice is unwil-

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ling to go; it is bitterly against his consent, as manifested at that time. But will any one doubt that the statute does not apply to such a case? It follows then that the statute must receive some reasonable and limited construction. It must mean an *unlawful* removal or transportation. But in the case supposed, and in the case at bar, the party taken has consented to be so taken, by entering into the relation of master and servant, bail and principal.

These principles are recognised in our sister States. In *Nicolls* v. *Ingersoll*, 7 Johns. R. 145, it is held, that bail may depute another to take and surrender their principal, and may take the principal in another State and in any place, and may break open the outer door of the house to take him. Pierpoint Edwards became bail for Nicolls in New Haven and deputed Asa Morgan to take the principal. Morgan and an assistant went to the house of Nicolls in Green county, New York, at midnight, and demanded that the door should be opened; which not being done, they broke it open and took Nicolls out of his bed, in virtue of the bail-piece. He was forced to go
142 to the river and into a boat, in which they crossed the river to Hudson. The court say, that the power of the bail does not depend upon any process, but results from the nature of the undertaking by bail; that it is not affected by the jurisdiction of the court or of the State; but that as between the bail and his principal, the controlling power of the former over the latter may be exercised at all times and in all places.

In *United States* v. *Bishop*, 3 Yeates, 37, Cremor became special bail for Bishop in Virginia. The principal was tried by a court-martial in Pennsylvania, and the bail followed him there. The court held that they could not take him out of the hands of the military tribunal, but that after the sentence should be executed, he should be delivered to the bail.

The Court are of opinion that Thompson must be surrendered to the respondent.[1]

PARKER C. J. added, that this decision has reference only

[1] See *Pease* v. *Burt*, 3 Day, 486; *Parker* v. *Bidwell*, 3 Connect. R. 84 *Ruggles* v. *Corey*, 3 Connect. R. 421; *Johnson* v. *Tompkins*, 1 Baldwin, 578 *Broome* v. *Hurst*, 4 Yeates, 123; *Read* v *Case*, 4 Connect R 166.

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to the relation subsisting between these United States; whether it would apply if the parties came here from a foreign nation, it is not necessary to determine.

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DANIEL RUSSELL, by his Guardians, Zenas Coffin *et al. versus* CHARLES COFFIN. 143

The selectmen of a town being appointed guardians of a spendthrift, under the statute authorizing the judge of probate to appoint the selectmen or "other suitable persons," do not cease to be such guardians on the expiration of the period for which they were elected to the office of selectmen.

It is not requisite that such guardians should give a bond with *sureties*, as a condition precedent to their acting; it being in the power of the judge of probate to remove them at any time, on their failing to give security as he may direct.

One of two witnesses to a deed deposed that he did not recollect witnessing it, but knew the attestation to be in his handwriting, and that the other subscribing witness had a short time previously, but long after the commencement of the suit, in which the deposition was taken, left the Commonwealth, after advertising his intention so to do, and that though the deponent did not recollect having seen him write his name, he had often received letters from him, and thought the signature in question was his handwriting. *Held*, that this was sufficient proof of the execution of the deed for the purpose of reading it in evidence.

A grantee, not having been in actual possession of the granted premises otherwise than by leasing them to his grantor and receiving rent from him, executes to a purchaser for a valuable consideration, a deed of conveyance, by "quitclaim and release" in the form in common use in Massachusetts, which was duly recorded in the registry of deeds. *Held*, that this was a sufficient conveyance to pass the estate, though the releasee had not a previous interest in or possession of the estate.

Where a witness on the stand, upon cross-examination, contradicted a deposition he had previously given in the same case, the party calling him was not permitted to call other witnesses in support of his general character for truth.

THIS was a writ of entry, dated the 19th of April, 1825, wherein the demandant counted on his own seisin and a disseisin by James Bigelow, who aliened to the tenant. The plea was, that Bigelow never disseised.

At the trial, before *Wilde* J., the demandant produced the decree of the judge of probate for the county of Nantucket, of the 25th of November, 1824, appointing the selectmen of the town of Nantucket, naming them, to be guardians of Russell, as a spendthrift, and also a bond of the same date, given by the same persons to the judge of probate, for the faithful performance of their duty as guardians of Russell, stated there-

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in to be a person *non compos mentis*. The selectmen of Nantucket, so appointed, ceased to be selectmen of that town in the March or April following their appointment as guardians, and one of them, Zenas Coffin, had died since the last continuance of this action; and only two of them, namely, Thomas
144 Macy and Hezekiah Barnard, were selectmen of that town at the time of the trial of the action, holding their offices by an election made a long time after the commencement of the suit.

It was contended by the defendants, that under these circumstances a nonsuit ought to be entered, or that the suit ought to abate. The objection was overruled and the point reserved for the opinion of the Court.

The demandant then offered a deed of release from William Coffin to Russell, of the demanded premises, dated April 28th, 1819, containing a covenant of warranty only against all claiming under the releasor, and purporting to be witnessed by Josiah Hussey and Oliver C. Bartlett. To prove the execution of this deed the demandant read the deposition of Josiah Hussey, who could only testify that the signature of his name was in his handwriting, and he had no doubt he saw it executed, as he was not in the habit of signing his name to what he did not see executed.

It appeared also from Hussey's deposition, that Oliver C. Bartlett had been a resident of Nantucket long since the commencement of this action, and had removed to New York about a fortnight before the time of taking Hussey's deposition, having previously published his intention of removing, in the public journals of the island. He also testified to the handwriting of Bartlett. The tenant objected to the reading of the deed in evidence, on the ground that the testimony of the other subscribing witness had not been produced. The judge admitted the deed to be read and reserved the point.

To prove seisin and possession, the demandant read the deposition of William Coffin, who testified to the execution of his deed of release, and of several deeds not produced at the trial, from Benjamin Winslow to the witness. The witness never had actual possession under these deeds, but he considered Winslow as his tenant at will; who had remained in possession until 1825, excepting when he was put out of posses-

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sion by the levy of an execution in favor of James Bigelow in the spring of 1822.

Upon this testimony it was contended, in behalf of the tenant, that it did not appear that William Coffin had ever been in actual possession of the premises, so that the release could 144 operate, which, it was contended, did not itself give seisin; and the demandant had never made any formal entry, either by himself or guardian, before commencing the suit; and as there was no evidence of an ouster or disseisin of Russell by Bigelow, the demandant had not supported his action, and a nonsuit ought to be entered. But this objection was also over ruled.

The tenant then gave in evidence copies of the proceedings in a suit of Bigelow against Winslow, from which it appeared that an attachment was made of Winslow's right in the land, and that the land was set off to Bigelow as the property of Winslow, whereupon Winslow, who was then in possession, was turned out, and Bigelow put into possession. The tenant also gave evidence of a warranty deed of the premises from Bigelow to himself.

The demandant then offered in evidence a deed of the premises from Winslow to William Coffin, dated October, 1826, purporting to be witnessed by Josiah Hussey and James Hedge. He first read the deposition of Hussey stating that he had no particular recollection of the transaction, but that the signature was his handwriting, and that he believed the signature of Hedge to be in *his* handwriting. Hussey had never seen Hedge sign his name, but he had received letters from him several times, and he thought he had seen him write. The demandant had summoned Hedge, the other subscribing witness, who was present in court, but he declined to produce him, stating that he was a witness adverse to the demandant. The tenant contended, that upon this testimony the deed ought not to be read in evidence until Hedge should be called to testify to its execution. The objection was overruled and the deed was permitted to be read in evidence, and the point was reserved.

Hedge, being called by the tenant, gave testimony tending to show that the deeds from Winslow were made for the pur-

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pose of defrauding his creditors, and that this was known to Russell; and other testimony was introduced, to show, that the release was made to Russell by collusion between W. Coffin, Russell and Winslow, for the same purpose. Testimony was offered on the part of the demandant, to rebut the evi-

146 dence produced by the tenant; and the demandant was permitted to cross-examine Hedge as to the testimony he had given in a certain deposition then in the counsel's hands, which had not been read to the witness, nor in evidence, and the witness having given testimony in some particulars different from such deposition, and having testified to some things material in the cause, not stated in his deposition, the counsel were permitted to give the deposition in evidence to impeach his testimony. Whereupon the tenant proposed to call witnesses to prove the general character of the witness for truth. But this evidence was ruled out, and the counsel for the demandant were permitted, in argument to the jury, to treat the testimony of this witness as having been given falsely, with a view to benefit the tenant; and the jury were instructed, that this was a subject proper for their consideration; to all which the tenant excepted.

The jury found a verdict for the demandant.

March 13th. *K. Whitman* and *Rand*, for the tenant, objected to the sufficiency of the bond of the guardians, for want of sureties. It did not appear whether it was the bond of the selectmen *as such*, or their personal bond; if the former, they had ceased to be the proper parties, as their office expired at the end of the year. There were seven originally, now only two. Their names cannot be struck off one after another, so as to leave only one obligor in the bond, without defeating the guardianship. *Morgan* v. *Dillon*, 9 Mod. 142; Bac. Abr. *Guardian*, *A.*

The execution of the release was not sufficiently proved. It being known that Bartlett, one of the subscribing witnesses, was about to leave the State, his deposition should have been taken. 1 Stark. Ev. 330, 340; Harrison on Ev. 94.

Neither Coffin nor Russell having possession, nor having made any formal entry, nothing passed by the release. *Thacher* v. *Cobb*, 5 Pick. 425; *Porter* v. *Perkins*, 5 Mass. R.

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233; *Warren* v. *Childs*, 11 Mass. R. 222; *Hamblet* v. *Francis*, 4 Mass. R. 78; *Kennebeck Purchase* v. *Call*, 1 Mass. R. 483; *Bennet* v. *Irwin*, 3 Johns. R. 366; 4 Dane's Abr. 144, *c.* 110, *art.* 5, § 26; Dixon on Title Deeds, 663, 665; 2 Preston on Conv. 324. To give effect to a release like this, there must be some privity of estate between the releasor and releasee. A release to a tenant at sufferance or one holding over, will not pass any estate. If it is construed to be a bargain and sale, the releasor is made to covenant that he has a right in the land, which is inconsistent with the intention of the deed. 147

The evidence offered, of Hedge's good character, ought to have been admitted. 3 Stark. Ev. 1757; *Stephenson* v. *Walker*, 3 Esp. R. 284. His general character being impeached, the tenant ought to have been permitted to support it.

As one of the guardians has deceased since the action was commenced, it must abate.

The guardians are not rightly appointed; the decree of the judge of probate states Russell to be a *spendthrift*; the bond is given as by guardians of a person *non compos mentis*.

F. Dexter, for the demandant, contended that the statute does not require the guardians to be such, in their official capacity of selectmen. As to the decease of one of the guardians since the suit was commenced, as he was a mere trustee, this is not a cause of abatement or nonsuit. Bac. Abr. *Abatement*. Where the same judgment may still be rendered, the death of a party is not a cause of abatement. On the death of one tenant in common, the suit in the names of all abates; but not so in the case of joint tenants. In the present case the trust devolves on the survivors.

As to the proof of the execution of the release, where one of the subscribing witnesses is beyond the process of the court, proof of his handwriting is sufficient. *Dudley* v. *Sumner*, 5 Mass. R. 462; 1 Phil. Ev. 364, note; *Jackson* v. *Burton*, 11 Johns. R. 64; *Barnes* v. *Trompowsky*, 7 T. R. 265.

In regard to the possession requisite to give effect to the release, W. Coffin states, that Winslow, being in possession, made his deed to Coffin, thereby giving him a seisin, and as Winslow continued in possession as tenant under Coffin, his

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possession was that of Coffin. This deed of release, if the releasor is in possession, will operate as a bargain and sale. *Pray* v. *Pierce*, 7 Mass. R. 381. A release may be construed to pass an estate, though the releasor is not in possession *Goodtitle* v. *Bailey*, Cowp. 598.

148 The demandant had a right to cross-examine Hedge before producing his former deposition. 3 Stark. Ev. 1750. In the *Queen's case*, 2 Brod. & Bingh. 309, it was held that evidence of the contents of a letter is not to be given, if the letter can be produced. But our purpose was, not to prove what the former deposition contained, but to discredit the witness. 3 Stark. Ev. 1745. This did not authorize the tenant to bring evidence of general character. *Stephenson* v. *Walker*, 4 Esp. R. 50. Evidence of character can be introduced only where the character is impeached generally ; not where the witness is discredited as to a particular fact. If a witness contradicts himself on the stand, this certainly does not give a right to introduce evidence of general character, nor can such evidence be introduced any more in case of his contradicting himself in giving his testimony at two different times in the same case. In *Bishop of Durham* v. *Beaumont*, 1 Campb. 210, two witnesses contradicted each other, and evidence of the general character of one of them was not permitted to be given ; nor could it be in this case where the witness contradicted himself.

April 2d. Parker C. J. delivered the opinion of the Court. The first objection to the action is, that the demandants are not entitled to sue as guardians, the letter of guardianship being to them with five others, selectmen of the town of Nantucket, the term of whose office has expired, and the demandants not being selectmen, at the time the writ was sued out.

The statute authorizes the judge of probate to take care of the estates of spendthrifts, by appointing the selectmen or *any other suitable persons* as guardians over them ; and the persons appointed are to give bonds, &c.

We think it very clear, that the legislature did not intend that the selectmen, in their municipal character, should be guardians ; that every thing done respecting the estate should be done by the board sitting in its municipal form ; that the

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trust of guardian should be annual, so that new appointments should be necessary every year; or that it should go by succession, with the office of selectmen. In giving the power to appoint the selectmen, the legislature seem only to have considered the persons holding that office as enjoying the confidence of the town, whose interests were to be taken care of by 149
the guardians; a principal object being to prevent the estate from being wasted, lest the spendthrift might become charge able to the town. The judge of probate is to appoint "the selectmen or some other suitable persons"; evidently recommending the selectmen as suitable persons, and directing the attention of the judge of probate to them as such, but not intending to vest them with the trust as a corporation or municipal body; otherwise their personal bonds would not have been required, and it would have been expressly enacted, that the selectmen and *their successors* in office should be the guardians.

The case of *Newhall* v. *Wheeler*, 7 Mass. R. 189, is somewhat similiar. In that case, there was a conveyance to three persons, selectmen of the town of Hollis, and *their successors* in the trust of selectmen for the time being, for the use, &c. of one Hunt during his life, with a remainder to his heirs forever. It was held, that the three persons, to whom the conveyance was made, took the estate personally in trust, notwithstanding it was conveyed to them as selectmen.

The letter of guardianship is certainly far from being an accurate execution of the power of the judge of probate, under the statute; but its defects are not substantial. It is directed to the selectmen of Nantucket, without naming them; but in the close of the instrument, the names of the persons holding that office are mentioned. The bond is taken from them in their private capacities, and binds their heirs, executors and administrators; *but there are no sureties.* This, however, does not make the guardianship void; for the giving bond with surety is not a condition precedent to the executing of the authority of guardian, it being in the power of the judge of probate to remove guardians, if they fail to give security from time to time as he shall direct. *St.* 1783, *c.* 38; *St.* 1816, *c.* 94, § 3.

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We think then, that the demandants are rightly in court as guardians, they having been lawfully appointed with others, and the trust having devolved upon them.

The next objection is, that the deed of release, under which the demandants claim, was not sufficiently proved, one of the
150 subscribing witnesses, whose deposition is in the case, not recollecting the fact of execution, though verifying his attestation or rather his signature as a witness, and the other not being called.

It is so very common a case, for attesting witnesses, who frequently are present but for a moment and do nothing but write their names, to take no notice of or to forget the instrument which they attest, that if it were required that they should recollect the facts and circumstances, few estates would bear a scrutiny. It has been the invariable practice in such cases, for the instrument to go to the jury with such testimony as was given in this case, not as conclusive, but as presumptive proof of the execution.

And one of the subscribing witnesses is sufficient, the other not being within the process of the court; unless there is some reason to believe or suspect that the instrument has been forged.

In *Norris* v. *Freeman*, 3 Wils. 38, a new trial was granted, because one of the subscribing witnesses, who it seems was within reach, was not called. But this evidently was considered in a discretionary light by the court, and not as strictly a matter of law; on the contrary, the case would seem to prove, that in ordinary cases the testimony of one of the subscribing witnesses was sufficient. In the case then before the court, the defendant in the action set up a release; there were strong grounds of suspicion that the release was forged; and there were witnesses, who swore that the signature was not, in their opinion, the plaintiff's. The judge who tried the action stated, that in his opinion the evidence was in favor of the plaintiff. Under these circumstances the court granted a new trial, because one of the subscribing witnesses was not called, in order that there might be a more satisfactory trial of the genuineness of the release. One witness swore, that he heard the defendant say he would let judgment go against him by default, and

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that he did not pretend he had any release. It also appeared that the declaration was of Trinity term 1768, and that the release was not pleaded until Trinity term in the next year. These were strong grounds of suspicion ; and it was on this account that a new trial was granted, in order that the other subscribing witness might be examined.

The case of *Hodnett* v. *Forman*, 1 Stark. R. 90, is in point. 151
The bond sued purported to have been executed in Ireland, and to have been attested by two subscribing witnesses. The plaintiff called one of the witnesses, and proposed to prove the handwriting of the other witness, who was then in Ireland, and no application had been made to him to attend ; but on the authority of *Prince* v. *Blackburn*, 2 East, 250, Lord *Ellenborough* admitted the evidence.

In the case of *Prince* v. *Blackburn*, one of the subscribing witnesses was dead, and the other was in a foreign country. The defendant pleaded *non est factum*. The instrument was allowed to be read in evidence, upon proving the handwriting only, of both the witnesses.

In the case at bar, the absent witness was out of the Commonwealth, and the signature was proved to be his handwriting by the other witness.[1]

But the more important question relates to the legal effect and operation of the deed of William Coffin to Russell, which is objected to, on the ground of its being a naked release, and therefore as not passing the estate, the releasee not being in possession at the time of its execution.

The general doctrine, on which this objection rests, that a mere release of a right to one not seised or in possession of the estate passes nothing as a release, cannot be contested. But this doctrine has been considerably qualified, even in ancient times, by a meritorious desire in courts of justice to give force to the intention of parties, although, by a strict technical construction of the form of conveyance adopted, that intention would be frustrated. The broad and liberal principle, that deeds and other instruments shall be so construed and applied as to pass an estate, when such was the intention, is laid down

[1] See *Whittemore* v. *Brooks*, 1 Greenleaf, 61, note ; 1 Stark. Evid. (5th Am. ed.) 327, 329 and notes.

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in Shep. Touch. 82, 83. It is recognised in the modern digests, particularly in Cruise.

And it was fully sanctioned by this Court in the case of *Pray* v. *Pierce*, 7 Mass. R. 381. The counsel for the tenant admits, that that case, if law, must govern this; but he denies its authority, and contends that it is not supported by the cases cited by the Court in the opinion; which was delivered by *Parsons* C. J., although it does not appear under his name.

152 It is very true that the cases cited differ in one respect from the case decided, namely, that in the conveyances referred to, in addition to the words of release, there was the word *grant*. But the principle of the cases is the same. That principle is, that where it is apparent that there was an intention in the grantor to convey, and in the grantee to take, although the instrument is not calculated technically to execute that intent, it should be made to operate in some other way, to effect the purpose.

Now we apprehend that the term *grant*, which appears in the English cases cited, has no effect in producing this result. A grant, by itself, does not technically pass the estate; it conveys only an incorporeal right, and when used in instruments intended to operate as releases, it makes the instrument no more than a release. So that when a deed of lease and release, having the term *grant* in it, is made to operate as a covenant to stand seised to the use of the releasee, as in the case cited in *Pray* v. *Pierce*, it is only by force of the general principle of giving effect to the intention of the parties, in a way different from the technical operation of the instrument, that it is held so to operate.

Willes C. J., in *Roe* v. *Tranmer*, 2 Wils. 78, observes, "that the judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds, *ut res magis valeat*, &c." "By the word *intent* is not meant the intent of the parties to pass the land by this or that particular kind of deed, or by any particular form or mode of conveyance; but an intent that the land shall pass at all events one way or other."

Lord *Hobart*, in his Reports, *p.* 277, says, "I exceedingly commend the judges, that are curious and almost subtile *astuti*

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to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act." And this declaration is cited and approved by Lord *Hale*, in *Crossing* v. *Scudamore*, 1 Ventr. 141.

Now, in the case before us, what are the elements of the contract between William Coffin, the releasor, and Russell, the releasee? The former had the title and the seisin of the estate under a deed from Winslow; he had the possession, not 153
actual but legal, Winslow being in as his tenant by lease; he received from Russell a full, valuable consideration for the land, so acknowledged in the deed; he covenants against all claiming under him and his heirs; and he releases all his right, &c. Now this deed cannot operate as a release, from the technical objection, that Russell was not then in possession. But shall the deed have no effect? Was it not the real intention that William Coffin should sell and that Russell should purchase? It would be going back to the dark ages, to say that it shall have no effect; when between the parties it was supposed to be as good and effectual to pass the estate, as a deed of bargain and sale should be.

We all know it to be very common for grantors, when selling and having a right to sell, to be desirous of protecting themselves against future claims, especially if there is any cloud on the title, though they are lawfully seised; and the most common, though not the best way of doing this, is to give a quitclaim deed instead of a deed of bargain and sale.

A large, if not the greater portion of titles in the country, are of this sort. Now if the releasor is seised, so as not to sell a pretended title, there can be no reason why his deed of quitclaim should not pass the estate. If he is not seised and the releasee is not in possession, then nothing passes by the deed; though it may then operate as an estoppel against the releasor.

We think it immaterial, whether this deed is to operate as a gift, a bargain and sale, or a covenant to stand seised; it is sufficient that it passed the estate. The case cannot be distinguished from *Pray* v. *Pierce*, and we have no disposition to

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overrule that case, believing that it was deliberately settled, and that it rests upon sound principle and sufficient authority.

"A deed that is intended and made to one purpose, may enure to another; for if it will not take effect in the way it is intended, it may take effect another way. And therefore a deed, made and intended for a release, may amount to a grant of a reversion, an attornment, or a surrender, or *e converso*. And if a man have two ways to pass lands by the common law, and he intended to pass them one way and they
154 will not pass that way, in this case, *ut res valeat*, they may pass the other way." Shep. Touch. 82.[1]

In regard to the objection, that the tenant was not allowed to give evidence of the general character of Hedge, one of the witnesses, we think it cannot prevail. Hedge was a subscribing witness to the deed from Winslow to William Coffin, but was not examined by the demandants, from an apprehension that his testimony would be adverse. He was then introduced by the tenant, and was cross-examined by the demandants, who afterwards read Hedge's deposition, to contradict his testimony on the stand. There was nothing irregular in this course; nor was there a right to go into evidence of his general character, notwithstanding the attempt to impeach him by contrasting his testimony given at a different time.

The position, as laid down by Starkie, cannot be carried to the extent contended for. He probably meant only, that where the questions put in the cross-examination and the answers did impeach his general character, the other party might rebut by proving a good general character. And so far we do not object to the principle. As in the case stated by Starkie, the witness was asked, whether she had not been twice committed to Bridewell, and answered that she had. This went to affect her general reputation; and the party who called her, was allowed to prove, that since those commitments her character had been fair and good.

But it never was decided, that if a witness was contradicted as to any fact of his testimony, either by his own declarations

[1] See *Somes* v. *Skinner*, 3 Pick. (2d ed.) 58, note 1; *Reformed Dutch Church* v. *Veeder*, 4 Wendell, 496; *Croade* v. *Ingraham*, 13 Pick. 549; *Dart* v. *Dart* 7 Connect. R. 250; Revised Stat. *c.* 59, § 5.

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at other times, or by other witnesses, evidence might be admitted to prove his general good character. If this were the practice, great delay and confusion would arise, and as almost all cases are tried upon controverted testimony, each witness must bring his compurgators to support him when he is contradicted; and indeed it would be a trial of the witnesses and not of the action.

None of the objections prevailing, the judgment must be upon the verdict.

WILLIAM B. BRADFORD *versus* WILLIAM H. HUBBARD *et al.* 155

A bill of exchange was drawn in Boston, by J. R. B. on H. & Co of Richmond, who accepted it for the accommodation of the drawer, and on his engagement to place funds in New York, where the bill was payable, to meet it at its maturity. The bill was indorsed by the plaintiff, also for the accommodation of the drawer, with a knowledge of all the circumstances, and he advised the drawer to adopt this mode of raising money. The drawer having failed and assigned his property for the benefit of his creditors, before the bill became payable, it was dishonored and returned to Boston, where it had been discounted for the drawer, and where the plaintiff took it up as indorser. The assignment provided for indemnifying the plaintiff against all indorsements made by him on account of the drawer, and there were funds in the hands of the assignees to which he could resort for the payment of the bill. *Held*, that the acceptors were exonerated, and that the holders must resort to the funds in the hands of the assignees, for payment of the bill

THIS was assumpsit on a bill of exchange drawn by John R. Bradford, in Boston, on the 15th of March, 1826, on the defendants, merchants of Richmond, Virginia, for 1000 dollars, payable in four months at the Mechanics' Bank in New York, to the order of the drawer, by whom it was indorsed. The plaintiff was the second indorser. It was duly accepted by the defendants; but on presentment at the Mechanics' Bank at maturity, was not paid, and was thereupon duly protested for non-payment. It had been discounted for John R. Bradford on the 17th of April, at the American Bank in Boston, to which it was returned on non-payment at New York, and was thereupon taken up by the plaintiff, as indorser. The bill was accepted by the defendants, and indorsed by the plaintiff, merely for the accommodation of the drawer, who promised

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the defendants, at the time of their accepting the bill, that he would place funds in New York to take it up at maturity, and the plaintiff knew of its being accepted for the accommodation of the drawer, and he knew of the undertaking, on the part of the drawer, to place funds in New York to take up the bill, and the drawing of the bill was advised by the plaintiff as a means of raising money. The drawer stopped payment in June, before the bill became due, and on the 19th of that month made an assignment of his property for the benefit of his
156 creditors, providing in the first place for the payment, in full, of the debts due to his father, and secondly for the payment of certain debts due to the plaintiff, and also for securing and indemnifying him against any liabilities by indorsement of any notes, bills, &c. on account of John R. Bradford; and there were sufficient proceeds of the assignment in the hands of the assignees to take up the bill, after discharging the other preferred debts, and the assignees held the same for the purpose of paying the plaintiff in case he should fail to recover in this suit; all which was known to the plaintiff. At the time of accepting the bill, the defendants were indebted to the drawer about 300 dollars, not then due, but which had become due and had not been paid at the time of commencing this action. The drawing and acceptance of the bill had, however, no reference to this balance. After the failure of John R. Bradford, the defendants commenced a process, in the nature of a foreign attachment, in a court of equity in Virginia, and recovered, by decree of the court, of one Putney, a debtor of John R. Bradford, the sum of 270 dollars, the ground of that process being the liability of the defendants as acceptors of this draft. The sum so recovered was subject to the control of the court, and, pursuant to a decree, the defendants gave bond to respond for the amount, whenever the court should so order. The defendants were ready to pay over to any person authorized to receive the same, the balance due from them to John R. Bradford, and also the sum recovered under the decree of the court of equity, on being discharged from their bond.

Parker C. J. directed a nonsuit, subject, &c.

March 14th. ***Rand***, for the plaintiff, contended that the acceptor of a bill is liable to all the other parties to it. The plaintiff's knowing

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it to be accommodation paper, made no difference in regard to his right to resort to the acceptors. *Fentum* v. *Pocock*, 5 Taunt. 192; *Mallet* v. *Thompson*, 5 Esp. R. 178; Chitty on Bills (6th ed.) 183; *Bank of Ireland* v. *Beresford*, 6 Dow, 239. Nothing but payment will discharge the acceptors. *Brown* v. *Mott*, 7 Johns. R. 361. The plaintiff is not bound to resort to the drawer. It was intended that he should resort to the proceeds of the assignment for liabilities which he is under on account of the drawer, after having indemnified himself, as far as he is able, by resorting to other parties. His discharge of the drawer under the assignment, does not discharge his claim upon the acceptors, who are the parties ultimately liable. Notwithstanding his general release of the drawer, he has a right to resort to the acceptors. They were included in John R. Bradford's schedule of creditors, on account of this acceptance.

Fletcher, for the defendants, contended that the plaintiff, by becoming a party to the assignment, had released this very debt. The assignment was a substitution for John R. Bradford's agreement to remit funds to New York to meet this bill. If the acceptors are liable to the plaintiff, could not they come upon the drawer for reimbursement, and he again on the plaintiff, if, having the means of satisfying the bill without resort to the acceptors, he should neglect to avail himself of those means? *Sargent* v. *Appleton*, 6 Mass. R. 35; *English* v. *Darley*, 3 Esp. R. 49; *S. C.* 2 Bos. & Pul. 61. Having discharged the party ultimately liable, he has discharged all intermediate parties. The plaintiff must avail himself of the security he has in his hands, or within his reach. *Hayes* v *Ward*, 4 Johns. Ch. R. 132; *People* v. *Jansen*, 7 Johns. R. 332, 337.

PARKER C. J. delivered the opinion of the Court. We think the defendants are not liable in this action, they having accepted the bill which is in suit, entirely for the accommodation of John R. Bradford, by whose order and for whose use it was drawn, and who had agreed to place funds in the bank in New York to meet it when due. The plaintiff knew of this arrangement, and therefore is not entitled to recover, if he is indemnified from another source.

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It appears by the authorities, that a *bonâ fide* holder of a bill accepted for the accommodation of the drawer, may recover of the acceptor, although he knew it was not drawn on account of funds; but if he is secured or indemnified by the drawer, there is no reason to allow him to recover of the acceptor, and thus drive the acceptor to an action against the drawer.

In this case it appears, that provision is made in the assignment of the drawer, for indemnity to the plaintiff for all liabil-
158 ities on bills, &c. and it is agreed in the case, that the funds are sufficient to indemnify the plaintiff, and that the trustees are ready to pay him the full amount of this bill whenever it shall be decided that he cannot recover of the defendants. There is no reason in compelling the defendants to pay him, in order to release that portion of the funds for other creditors, and oblige the defendants to come in among the unpreferred creditors to obtain probably a small part, and perhaps nothing, of their debt so created.

The cases cited by Mr. Rand, to show that the acceptor of an accommodation bill is always answerable for the amount of the bill until it is paid or a release is given, were well decided under their particular circumstances, and perhaps are founded on a good general rule; but there are exceptions, the justice of which is as manifest as that of the rule.

If the holder has in his hands funds of the drawer who is the real debtor, with a right to apply them to the discharge of the bill, he can have no right to call on the acceptor. Indeed the bill ought to be considered then as paid. Now we consider the appropriation of the proceeds of the effects of John R. Bradford to the payment of the plaintiff as indorser of this bill, in the same light as if the money was in his own hands. It is so appropriated by the assignment, and the money is at the command of the plaintiff whenever he chooses to receive it.

The case cited from 5 Esp. R. 178, to show that the acceptor was liable notwithstanding a deed of composition in which the holder of the bill was provided for, and he had discharged the drawer, is without doubt good law, for the holder having received less than the whole debt, has a right to call on

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the acceptor for the residue, and his discharge of the drawer does not affect the acceptor's claim upon him. The principle of the case we admit, but it does not govern this case, for here the whole debt is paid into the hands of trustees, who hold it for the use of the plaintiff.

The proceedings of the defendants in Virginia, whereby they attempted to secure themselves out of debts due there to John R. Bradford, by a process in chancery, does not affect their liability in this action. The process itself shows, that it is intended only as an indemnity against eventual liability, for 159
the defendants are under bonds to restore the money, if it shall be so ordered by the court. Their charge of the acceptance in their account, did not, under the circumstances, fix them upon the bill, for their contingent liability was a sufficient reason for the charge and for the measures taken for their security. Neither does their indebtedness in a balance of account at the time they accepted the bill, affect the case, as the bill had no reference to that balance, and was manifestly a mere accommodation bill.

We think it very clear that the defendants are not liable in this action. The motion to take off the nonsuit is therefore overruled.

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ALBERT HOBART *et al. versus* ARIEL NORTON *et al.*

Where a master of a vessel insured from one port to another, intends to deviate by putting into an intermediate port and actually puts in there, the assured may nevertheless give evidence that necessity, and not the original intention, was the immediate cause of putting in, and that consequently there was no deviation.

A vessel being advertised for a voyage from Boston to Charleston, took goods for the latter port, which, by the bill of lading, were to be delivered there, and which the shipper caused to be insured for such a voyage. She took other goods for Edgartown in the island of Martha's Vineyard, it being the original intention to put into that port. The vessel did in fact put into Edgartown, but the course of the wind and tides were such that she must have so put in, had there been no such intention originally. The goods were afterwards damaged by perils of the seas in the course of her voyage to Charleston, and sold at a loss. *Held*, that the owners of the vessel were not answerable to the shippers for this loss.

The intention, at the commencement of a voyage, to put into an intermediate port out of the course of the voyage described in the bills of lading and advertisements, the termini being still the same, is not the substitution of a different voyage, but is only an intention to deviate.

ASSUMPSIT on a bill of lading, dated October 15th, 1827, against the owners of the sloop Hero, one of whom, Ephraim Ripley, was then master. The bill of lading was signed by Ripley, and was in the common form; stating that the goods were shipped in good order by the plaintiffs, on board the sloop then "lying in the port of Boston and bound for Charleston, South Carolina;" for which voyage she had before been advertised. The plaintiffs had effected insurance to the amount
160 of 2584 dollars on their shipment, "from Boston to Charleston." Goods had been taken on board of the sloop for divers persons, to be delivered at Edgartown, in Martha's Vineyard, and the master intended, at the time of sailing, to put into that port for the purpose of delivering such goods. The master did in fact put in there on the voyage, and remained there about three days, and delivered the goods shipped for that port. He then proceeded on the voyage to Charleston, in the course of which he encountered bad weather, and was stranded on the coast of Virginia, whereby the plaintiff's goods were wet and damaged, and, in consequence of the disaster and damage, were sold by auction at considerable loss: to recover which loss this action was brought; on the ground, that the taking goods for Edgartown and stopping to deliver them, discharged the underwriters from any liability under the policy.

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At the trial, the defendants offered evidence, that though there was an original intention to put into Edgartown, yet, in fact, the sloop went in on account of the wind and tide, and that as these were at the time, she would have gone in, though there had been no such original intention; and that she was not detained by the delivery of the freight there, but proceeded on the voyage as soon as the wind permitted. *Wilde* J. allowed this evidence to be given, and instructed the jury, that if they were satisfied that the sloop went into Edgartown on account of the state of the winds and tide, and that they were such as to render it expedient to go in there, and that she was not detained by the delivery of the freight, they should find a verdict for the defendants; whereupon the jury found a verdict for the defendants. If this evidence was improperly admitted, or if the instruction was erroneous, the verdict was to be set aside.

Fletcher and *Willis*, for the plaintiffs. If the defendants have done acts by which the plaintiffs' right to indemnity under the policy was defeated, they are liable. *Gilchrist* v. *Ward*, 4 Mass. R. 692; 2 Holt on Ship. 57; *Peele* v. *Price*, 4 Camp. 243. This was such a deviation as avoided the policy. *Pelly* v. *Royal Exch. Ass. Co.* 1 Burr. 343; Phil. on Ins. 191. The vessel sailed on a different voyage from that insured by the plaintiffs and described in the advertisement and bill of lading. 4 Campb. 243. The question as to what shall be considered the same, and what a different voyage, is not very definitely settled. The rule laid down in New York seems to be the best, namely, if a vessel touch at an intermediate port for the purposes of the voyage, it does not change the identity of the voyage, but if for a distinct purpose, and in pursuance of an original intention, this makes it a different voyage. Here it was originally intended to put into Edgartown. *Stott* v. *Vaughan*, Marsh. Ins. 232; *Wooldridge* v. *Boydell*, 1 Doug. 17; *Way* v. *Modigliani*, 2 T. R. 30; *Robertson* v. *Columbian Ins. Co.* 8 Johns. R. 383; *Silva* v. *Low*, 1 Johns. Cas. 184; *Bond* v. *Nutt*, Cowp. 601. The master being bound to put into Edgartown and not having liberty to use his discretion in the choice of harbours, changed the risk. *Middlewood* v. *Blakes*, 7 T. R. 162. In this voyage there were

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two courses, one through the Vineyard Sound, which the master was obliged to take, the other outside of Nantucket. This brings the case within the principle of *Middlewood* v. *Blakes*. Sailing with an intention to stop at Edgartown and actually stopping there, was a deviation. *Solly* v. *Whitmore*, 5 Barn. & Ald. 45. The act is, in such case, coupled with the original intention.

S. Hubbard and *Dunlap*, for the defendants, contended that the circumstance of the plaintiffs' having got insurance could not affect the liability of the defendants, who are answerable only to the same extent to which they would have been, had no insurance been made; and in such case they would have been liable, at the most, only for the actual damage, if any, directly consequent upon touching at the Vineyard. There is no stipulation in the bill of lading to perform the voyage without any delay or deviation. There are only two cases in which any attempt has been made to sustain an action like the present, viz. *Max* v. *Roberts*, 12 East, 89, and *Gray* v. *Thorndike*, Phillips on Ins. 207. This was not a case of the substitution of a different voyage; the *termini* were the same, and this is considered to be the criterion. Phil. Ins. 215, 217; and see *Hare* v. *Travis*, 7 Barn. & Cressw. 14 It does not appear that the underwriters are discharged; the making a port of necessity is no deviation; they have no ground of defence. The vessel was owned in part at the

162 Vineyard, and it is proved to be a very common practice, and all but an established usage, for such vessels to go through the Vineyard Sound on this voyage, and to put into the Vineyard, and deliver freight taken for the owners and their families. Suppose the vessel had arrived in Charleston, would not the plaintiffs have been obliged to take their goods and pay freight? Could they in such case have alleged, in defence against the claim of freight, that the vessel had not sailed by the shortest route? To bring this case within that of *Max* v. *Roberts*, a promise to sail by the shortest route ought to be proved. That the touching at the Vineyard is not mentioned in the bill of lading, is no proof that the voyage was intended or agreed to be direct from Boston to Charleston. An intermediate port is never mentioned in the bill of lading.

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Per Curiam. We think the facts in this case do not show that a different voyage from that described in the policy was undertaken. The voyage, as described in the bill of lading, was from Boston to Charleston. The vessel left Boston for Charleston, but with intent to stop at Edgartown on the way there, and discharge freight. It was a voyage to Charleston, with intention to deviate. The cases in 2 T. R. 30, and 1 Douglas 17, are where the voyage set out upon was different from that insured. In the first, it began from a wrong place; in the second, it was intended to terminate at a wrong place; so the voyages were entirely different. Here the place of starting, and the final object, were the same as in the voyage described, but there was an intention to go into a port on the way. This intention alone would not defeat the voyage contracted for.

The vessel however actually went into Edgartown and stayed there three days. This, unless there were sufficient cause for it, would discharge the underwriters and make the defendants liable. But the defendants say that the vessel went there from necessity, and so the underwriters are not liberated. It was manifestly the intention of the master to put into Edgartown, though from the advertisement the plaintiffs might suppose that he was to sail direct for Charleston; but the defendants said that he did not go to Edgartown in pursuance of his original intention, but that a supervening necessity led to the act, and that so they are excused. The jury were instructed, that if 163
the vessel did not put in from necessity, there was a deviation, but that otherwise they would return a verdict for the defendants. The jury having found that there was a necessity, we are to decide whether that question was properly referred to them, there being a previous intention to stop at Edgartown. To determine this we must recur to the principles which regulate insurance. It is well known, that an intention to deviate, is not a deviation. There is always *locus pœnitentiæ*. This master might possibly have been informed just before he put in, that he would defeat the insurance, and have determined to proceed direct to Charleston, when this overpowering necessity supervened. Therefore, although this is a strong case and may tend to the raising of fictitious storms, yet we think it was

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rightly left to the jury to decide what was the reason for putting into Edgartown. They will of course require stronger evidence in a case of this sort than in ordinary cases. They are to look to the immediate cause of putting in, and not to the remote cause; and if they are satisfied that the violence of the winds and waves was the immediate cause, it will be a justification to the master.[1]

Judgment according to verdict

JOHN PECK, in Error, *versus* ISAAC WARREN.

The defendant in an action in the Common Pleas was described in the original writ as "late of Boston, &c. now of Lexington in Kentucky," and the writ was served by attaching his real estate and leaving a summons with his agent. *Held*, that this service was insufficient; such a service being lawful only where the defendant was at no time an inhabitant of the Commonwealth.

THIS was a writ of error to reverse a judgment of the Court of Common Pleas, rendered at the September term 1826, in Middlesex, against the plaintiff in error. The original suit was an action of *assumpsit* on a promissory note, brought by Warren, the defendant, against Peck, the plaintiff in error, as promisor. In the original writ, Peck is described as "late of Boston, &c. now of Lexington in the State of Kentucky." By
64 the return of the sheriff, it appeared that he served the writ by attaching certain real estate belonging to Peck and by leaving a summons with his agent in this State.

The errors assigned are; 1. That there was no service of the writ: 2. That there was no sufficient service of the writ. and no appearance by Peck, in the original action.

March 24th. *A. Townsend*, for the plaintiff in error.

Shaw and *Bartlett*, for the defendant, cited *St.* 1794, *c.* 65; *St.* 1797, *c.* 50; *Touro* v. *Coates*, 10 Mass. R. 25; Anc. Chart. 49; *Tappan* v. *Bruen*, 5 Mass. R. 193; *Call* v. *Hagger*, 8 Mass. R. 423; *Gardner* v. *Barker*, 12 Mass. R. 36.

April 2d. PARKER C. J. We think it very clear, that there was no

[1] See 2 Phillips on Ins. 168; *Winthrop* v. *Union Ins. Co.*, 2 Wash. Circ C. R. 7.

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legal service of the original writ upon the defendant in the original suit, and therefore that the judgment was erroneous. The *St.* 1797, *c.* 50, § 1, provides the mode of service of writs, when goods or estate are attached; and it requires that a summons shall be delivered to the party, or left at his last and usual place of abode; and in case the defendant was at no time an inhabitant or resident in this Commonwealth, then such summons is to be left with his tenant, agent or attorney. The service in this case was in the latter mode; but it appears by the writ itself, that the defendant had been at some former time an inhabitant or resident within the Commonwealth, so that this mode of service was not lawful. It is no answer to say, that this service was more likely to give notice than the other, on account of the long absence of the defendant from the Commonwealth. The legislature is to judge of this, and it having prescribed the kind of service, none other will avail.[1]

Judgment reversed.

JOHN CARTER *versus* JOHN A. GREGORY. 165

A subsequent attaching creditor being admitted, under the statute of 1823, *c.* 142, to defend against the first attaching creditor, is not confined to the grounds of defence of which the debtor might have availed himself, the object of the statute being to prevent collusion between the first attacher and the debtor.

The general rule, that a party cannot give evidence of his declarations in his own favor, applies to declarations made by the plaintiff in an action which is defended, pursuant to the statute, by creditors of the defendant.

A note was made by a failing debtor, on which the payee immediately made an attachment of the debtor's property. Part of the alleged consideration of the note was an acceptance made by the payee, of an order drawn on him by the debtor in favor of another creditor. A subsequent attaching creditor being admitted, under the statute, to defend, it was *held*, that the plaintiff could not introduce evidence of his own declarations made on the day when the note was given, to show that the acceptance was made before the attachment.

ASSUMPSIT to recover the amount of a promissory note made by the defendant to the plaintiff on the 14th of April, 1828, for 1561 dollars and 51 cents, payable on demand.

At the trial it appeared, that the plaintiff, on the 14th day of

[1] See Revised Stat. *c.* 90, § 45; *Arnold* v. *Tourtellot*, 13 Pick. 172.

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April, commenced an action upon the note, and between 3 and 4 o'clock P. M. attached the defendant's stock in trade. John M. Peck, a subsequent attaching creditor, was allowed, under *St.* 1823, *c.* 142, to defend the action.

Two creditors, Bates and Brown, whose demands were not due, likewise made attachments on the same property on the 14th of April; and on the next day they were informed, that the plaintiff's attachment was intended to protect them. They then received from Gregory two orders drawn by him upon the plaintiff, which had been previously accepted, one for 530 dollars and 39 cents, the other for 571 dollars and 21 cents, both dated on the 14th of April, and payable in six months; and upon receiving these drafts, Bates and Brown gave up to Gregory the notes which they held against him. The sum due to the plaintiff, independent of these drafts, was 761 dollars and 51 cents; and he produced evidence to show that the excess of these three sums above the amount of the note in suit, was secured by the transfer of certain promissory notes.

The plaintiff, in order to prove that the acceptances were made before his attachment, proposed to ask Bates, who was a
166 witness, whether the plaintiff did not inform him on the 14th of April, that his (Bates's) demand was provided for, and that the plaintiff had agreed to pay it. The counsel for Peck objected, on the ground that the declaration of the plaintiff himself could not be given in evidence. *Wilde* J. ruled that the inquiry could not be made; and that the declarations of the plaintiff on the 14th or at any other time, not having been made in the presence of Gregory or Peck, could not be given in evidence in his favor.

It was contended on the part of Peck, that the note sued included the sum of 800 dollars which was not due to the plaintiff, and which was to be taken out of the proceeds of the stock and to be held in trust for the use of Gregory; and that the affair of the drafts was not thought of until after the other creditors had expressed dissatisfaction in regard to the amount of the plaintiff's demand.

The plaintiff contended that Peck could make no other defence than Gregory the defendant could himself make, and that Gregory could make no defence to this action.

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But the jury were instructed, that if they believed that no agreement was made by the plaintiff to pay Bates and Brown, before the note in suit was given, and that the note was given for 800 dollars more than was due to the plaintiff when it was made, they should deduct 800 dollars from the note and give a verdict for the balance; or if they believed that nothing was due to the plaintiff, that they should find for the defendant.

A verdict was returned for 796 dollars, 54 cents, being the sum of 761 dollars 51 cents, and interest.

March 26th

Fletcher and *Morse*, on a motion for a new trial, insisted that evidence of the plaintiff's declarations ought to have been received to rebut the presumption of fraudulent connivance between him and Gregory. They were part of the *res gestæ*. 1 Stark. Ev. 39, 47, 148. The counsel of Peck maintain, that the affair of the drafts was an afterthought; the declarations of the plaintiff would show that this was not the case. Those declarations were not offered as evidence of what they assert, but as facts. *Bartlett* v. *Delprat*, 4 Mass. R. 702; Stark. Ev. *ubi supr.* Gregory intended to prefer Carter, Brown and Bates; which he had a right to do; it was only providing for the payment of *bonâ fide* debts.

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Peck could make no defence which Gregory might not have made. *Strong* v. *Wheeler*, 5 Pick. 410. If he could, then by interposing he might prevent the plaintiff from obtaining the judgment to which he is entitled against the defendant upon the contract existing between them; and the legislature are not empowered to make a law having this effect.

Curtis, on the other side, referred, on the last point, to *Adams* v. *Paige*, 7 Pick. 542.

April 2d

PARKER C. J. delivered the opinion of the Court. The position taken by the plaintiff's counsel, that the defence set up by Peck could not be supported, because Gregory, the original defendant, could not have defended himself on the same ground, cannot be maintained. The object of the statute, under which this defence was made, is avowedly to prevent fraud in the attachment of real or personal estate; and the provisions of the statute are founded upon a supposed collusion between parties to the suit, to defraud creditors. To limit the defence which the subsequent attaching creditor is authorized to make,

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to such facts as the original defendant might himself aver, would be to impair in a great degree the use of the statute, as intended by the legislature. In cases of fraud and collusion, the defendant cannot avoid his contract by setting up his fraud in defence against it. It is only when a contract is avoided by statute, as in the case of usury or gaming, or when the consideration is illegal, that this can be done. Mere want of consideration, arising from a fraudulent bargain between the promisor and promisee, not in violation of any positive law, but for the purpose of defrauding others, cannot, we think, be shown in evidence by a party to the fraud, in defence of an action upon his contract. And it is such contracts that the legislature intended should be inquired into by third persons, whose rights are affected. The words "in like manner," in the statute, do not limit the defence, but only regulate the mode of making it. And nothing further than this can be drawn from the opinion of the Court, in the case of *Strong* v. *Wheeler*, 5 Pick. 410, [2d edit. 412, note 1.] Other expressions in the opinion, which are thought to limit the grounds of defence to such only as the original defendant might have used, ought to be referred to the subject then in discussion, which was merely the mode of evidence, by which a fact was to be proved.

168 It is said then, that the plaintiff is entitled to judgment, because he produces a note which the original defendant could not gainsay. If this is true, the statute is of no use; for its object is to admit others to a defence, which grows out of a collusive agreement between the plaintiff and the original defendant. Suppose the note to be fabricated for the sole purpose of abstracting the property of the promisor from his creditors, shall not this be shown? And yet the promisor himself could not show it. Or even suppose the note to be given for a valuable consideration, but that the sole purpose of the attachment was to defeat other creditors and to hold the property to the use of the debtor, shall not this be shown? And yet the promisor could not show it.

But it is said, that if the legislature so intended, their act is without authority, because the plaintiff, as between himself and the debtor, is entitled to a judgment. The same may be said in all cases of default, or confessions of judgment; and the ar

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gument will go further; for after judgment the plaintiff is entitled to execution and the fruits of it; and yet, even at common law, a subsequently attaching creditor may defeat the first attachment, by showing that the judgment was collusively obtained.

The statute has only provided a mode of preventing collusive judgments, instead of leaving the injured party to the relief before existing at common law; which was defective, because its final success depended upon the ability of the wrongdoer to respond in damages. The statute arrests the evil in the beginning, and rescues the property itself from the unlawful appropriation intended. Surely this was a just and proper subject of legislation; and the parties interested all have a hearing in court, and may maintain their several rights.

In regard to the declarations of the plaintiff, respecting the time when he accepted the drafts, which he alleges form part of the consideration of the note, we have not been persuaded by the very ingenious argument of the plaintiff's counsel, that they were not properly excluded.

The declarations of a party in his own favor, by the general rule, are inadmissible. A man cannot testify in his own cause; much less can his declarations not under oath be admitted. 169
The exception to this rule is, that when declarations accompany an act and have a tendency to show the motive and intention of the act, they are sometimes admissible. Such was the case cited of the bankrupt, who having committed an act equivocal in its nature, his declaration made at the time showing his intention, was admitted. This however was a declaration against himself strictly, as bankruptcies are supposed to be *in invitum*. There are however cases of declarations, or entries, operating in favor of the party making them, which are admissible; but, in all instances, they relate to, or accompany some act; and therefore are a part of the *res gestæ*.

The declarations excluded in this case were not of that character, but were mere naked assertions of a fact, which do not come within any exception to the general rule.

It is said, that the declaration so made is a fact. That is true, but the fact is also a declaration only, made by a party to support his own interest. Now it is true that, at the time of

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making the declaration, it probably had no reference to any controversy; yet, if it be admitted that such declarations are good evidence, we shall soon find cases of declarations and assertions of a fact as having happened, with a view to support what may be afterwards done, when it is too late to have its effect, and when it may become necessary to antedate, if we may use the expression, the fact in controversy. I cannot see that any thing beyond this is advanced by Starkie, and he cites no authority for some of his positions.

Judgment according to verdict.[1]

170 BENJAMIN WINSLOW *versus* SIMEON DRAPER.

In an action on the case, for falsely representing H to be "worthy of credit," knowing he was not, the defendant pleaded the general issue. The jury retired on Saturday afternoon and separated in about three hours, the judge having authorized them so to do, when they had made up their verdict; and on the following Monday morning, they rendered in a verdict, "that the defendant did not say H was perfectly good, knowing it to be false and with intention to defraud." The judge informed them what the issue was, directing them to retire again; which they did, and returned with a similar verdict, adding thereto, "and they thereupon find the defendant not guilty." *Held*, that the first verdict was defective in form only, and therefore that the separation of the jury and the return of the second verdict were not grounds for a new trial.

ACTION on the case for deceit in falsely representing one Hall "as worthy of credit, the defendant knowing him to be otherwise." The defendant pleaded the general issue, which was joined.

The jury retired at about one o'clock, for the purpose of making up their verdict, and separated at about four, in the afternoon of Saturday, the judge having authorized them to separate, when they should have agreed upon and sealed up their verdict. On the following Monday morning, they appeared in court and rendered in a verdict, "that the defendant did not say that Hall was perfectly good, knowing it to be false and with intention to defraud the plaintiff." The verdict was objected to as not finding the issue one way or the other, and the

[1] See *Lambert* v. *Craig*, 12 Pick. 199. The law upon this head has been changed by the Revised Stat. c. 90, § 87, 88.

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Court directed them to retire again, informing them that the issue was, whether the defendant was or was not guilty. The jury then retired and came in again with a similar verdict, with the addition of these words, "and they thereupon find that he is not guilty in manner and form," &c. Winslow v. Draper.

The plaintiff moved for a new trial for the following reasons: — 1. Because the jury separated, before they found a verdict on the issue submitted to them. 2. Because, after they had separated and a whole day had intervened, they were sent out again to agree upon a verdict. 3. Because the second verdict was not a finding upon the issue joined.

W. Sullivan, for the plaintiff, cited *Sargent* v. *Roberts*, 1 Pick. 337; *Rex* v. *Woodfall*, 5 Burr. 2661; *Bishop* v. *Kaye*, 3 Barn. & Ald. 605; *Gerrish* v. *Train*, 3 Pick. 124; *Kerr* v. *Hawthorne*, 4 Yeates, 295; *Crousillat* v. *Ball*, 3 Yeates, 386; *Davies* v. *Peirce*, 2 T. R. 125 and note; *Wells* v. *Parker*, 1 T. R. 40 and 783; *Hooper* v. *Shepherd*, 2 Str. 1089; *Oliver* v. *Springfield Presbyterian Church*, 5 Cowen, 283; *Lester* v. *Stanley*, 3 Day, 287; *People* v. *Olcutt*, 2 Johns. Cas. 301; *Little* v. *Larrabee*, 2 Greenl. 37; Hargr. Co. Lit. 155 *b*, note 276. *March 20th*

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C. G. Loring and *W. H. Gardiner*, for the defendant, cited Com. Dig. *Pleader*, *S* 3; Co. Lit. 227 *b*; *Blackley* v. *Sheldon*, 7 Johns. R. 32; *Burrill* v. *Phillips*, 1 Gallison, 363; *Smith* v. *Thompson*, 1 Cowen, 221, note; *The King* v. *Woolf*, 1 Chitty's R. 401 and note; *The State* v. *Babcock*, 1 Connect. R. 401 and note; *Clark* v. *Cole*, 1 Pennington, 278; *Horton* v. *Horton*, 2 Cowen, 589; *Bunn* v. *Hoyt*, 3 Johns. R. 254; *People* v. *Douglass*, 4 Cowen, 26; Com. Dig. *Pleader*, *S* 18, 19, 26; Co. Lit. 227 *a*; *Foster* v. *Jackson*, Hob. 54; *Burper* v. *Baker*, Cro. Eliz. 854; *Hodges* v. *Raymond*, 9 Mass. R. 316; Metcalf's Yelv. 78, note; Bac. Abr. *Verdict*, *O*; *Commonwealth* v. *Judd*, 2 Mass. R. 329; *Porter* v. *Rummery*, 10 Mass. R. 64; *Ropps* v. *Barker*, 4 Pick. 239; Co. Lit. 114 *b*.

Per Curiam. It seems to be settled that a mere separation of the jury, of itself, does not vitiate a verdict;[1] but in the *April 6th*

[1] Even in a capital case. *State* v. *Prescott*, 6 N. Hamp. R. 287.

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cases where this principle was established, the separation was probably for a short time, and we should not be willing to adopt it, where the separation should be for so long a time as from Saturday to Monday. But here the jury agreed on a verdict, in substance, before separating, and the object of the Court in sending them out again was merely to put it into form. It is said, however, that the first verdict amounted to nothing. This is not a fair construction of it. The jury intended to negative the averments in the declaration; and the verdict might have been put into form in court, without sending them out. The first verdict is substantially the same as the amended verdict.

Motion for new trial overruled

172 CHARLES C. NICHOLS *versus* LEMUEL ARNOLD.

Where auctioneers sold goods of the plaintiff to the defendant, and took in payment a note made by the defendant payable to his own order and indorsed by him, and he afterwards stopped payment, and the auctioneers became parties to an indenture of assignment for the benefit of his creditors, containing a release, and a sum was put down against their names as the amount of their demands, which was just sufficient to include all their other demands, and also this note, which still remained in their hands, though at the time of signing the indenture they said they did not know whether they had guarantied this sale or not; and it appeared on examination afterward that they had not, and they accordingly did not claim under the assignment for the amount of this note; and the plaintiff, being requested to become a party to the indenture, declined, saying that he was not a creditor of the defendant: — it was *held*, that the auctioneers, by thus becoming parties to the indenture, had not released the note in question.

Held also, that the plaintiff's declaration, made on the supposition that the sale was guarantied, that he was not a creditor of the defendant, was not an estoppel *in pais* whereby he was precluded from demanding of the defendant payment of the note.

A surrejoinder denying that the auctioneers had authority to release the defendant, *absque hoc* that they did release him, is bad for duplicity, each fact being material and a sufficient issue.

THIS was assumpsit on a promissory note, dated October 4, 1826, payable to the defendant's own order, and by him signed and indorsed. It was taken by Whitwell, Bond and Seaver, in payment for goods of the plaintiff sold by them, as auctioneers, to the defendant.

The defendant pleaded five pleas, on three of which the

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pleadings terminated in issues of fact, and on the two others, by demurrer to a surrejoinder.

In support of the pleas terminating in issues of fact, the defendant produced an indenture of assignment and release, made in December, 1826, and executed by the defendant on one part and divers creditors on the other, whereby, in consideration of this assignment, they released their demands against the defendant. To this instrument was annexed a schedule of the debts due from the defendant to several creditors respectively, and a certain sum was carried out against the names of Whitwell, Bond and Seaver, as creditors, and the instrument was signed by them, this schedule being annexed at the time of their signing. When the assignees subsequently sent to the several creditors to ascertain the precise amount of their demands, for the purpose of declaring a dividend, the 173
amount stated by Whitwell, Bond and Seaver, as due to them, was less than that carried out in the schedule, by the amount of the note in question; and they referred the assignees to the plaintiff as the owner of the note. The plaintiff being thereupon applied to on the part of the assignees, disclaimed having any interest in this note, and said he was not a creditor of Arnold, the sales, for which the note was given, having been, as he said, guarantied by the auctioneers, to whom he looked, having no concern with the defendant. It appeared that the defendant had considered himself to be discharged from this debt, and had represented to other persons that all his creditors had released their demands, and in consequence of these representations, they had intrusted him with property for the purpose of enabling him to prosecute business, which it was represented they would not have done, had they not supposed him to be free of debt. No dividend on this note was paid or offered to the auctioneers. Nichols having ascertained that they did not guaranty the sales, received this note from them in May, 1827. It was further testified by one of the auctioneers, that shortly after the assignment was made, he told the defendant that this note belonged to Nichols. He also testified, that when he signed the indenture, he stated that he did not know whether the sales for which the note was given, were guarantied by his firm, but that he was then advised that he

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was safe in signing, as his release would only apply to the amount actually due to his firm, whatever it might be; and his firm thereupon became a party to the indenture.

The defendant objected to the admission of any part of the testimony introduced by the plaintiff, except the note; on the ground that the declaration made by the member of the firm of Whitwell, Bond and Seaver, at the time of executing the indenture, could not be admitted to control the effect of a written instrument, and that the plaintiff, having declared that he had no interest in this note, and that he was not a creditor of the defendant, and the defendant having acted on this declaration, the plaintiff was estopped to prove that the facts were not as he had declared. He also contended that the plaintiff had, on the above facts, constructively assented to and acquiesced in the release of the debt by Whitwell, Bond and Seaver.

174 A verdict was found for the plaintiff; and the above questions, with that arising on the demurrer, were reserved for the consideration of the Court.

In the surrejoinder, the plaintiff "protesting that the said Whitwell, Bond and Seaver did not promise the said Nichols to be responsible for the price of the goods as in said rejoinder is mentioned, says, that he did not give his consent, approbation and authority to said Whitwell, Bond and Seaver, to become parties to the said indenture, without this, that the said Whitwell, Bond and Seaver did release, &c. in manner and form," &c. To this surrejoinder the defendant demurred for duplicity.

March 20th. *H. H. Fuller*, for the defendant, to show that the plaintiff's declaration that he was not a creditor of the defendant, was an estoppel *in pais*, cited Co. Lit. 352*a*, 352*b*; 2 Stark. Ev. 28, 31, 32, 33; *Watson* v. *Threlkeld*, 2 Esp. R. 637; *Robinson* v. *Nahon*, 1 Campb. 245; *Like* v. *Howe*, 6 Esp. R. 20; *Flower* v. *Herbert*, 2 Ves. sen. 326; *Meredith* v. *Hodges*, 5 Bos. & Pul. 453; *Smithson* v. *Smith*, Willes, 461; *Lipscombe* v. *Holmes*, 2 Campb. 441; *Goldie* v. *Gunston*, 4 Campb. 381; *The King* v. *Stacey*, 1 T. R. 1; *Jerritt* v. *Weare*, 3 Price, 602; *Howard* v. *Mitchell*, 14 Mass. R. 241.

In support of the demurrer, he cited 1 Chit. Pl. (ed 1809) 511.

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Peabody, for the plaintiff, contended, as to the demurrer, that the consent, approbation and authority of Nichols, and the discharge by Whitwell, Bond and Seaver, constituted but one fact, the whole of which might be traversed in the surrejoinder without duplicity, the whole surrejoinder being equivalent to saying that Whitwell, Bond and Seaver did not release with the authority of the plaintiff. 1 Chit. Pl. 578. What precedes *absque hoc* is inducement. That Whitwell, Bond and Seaver did not intend to release the note, is evident from the testimony of one of the partners.

An estoppel *in pais* is only where a declaration is made deliberately and where it would deceive. Here the defendant was not deceived. The plaintiff supposed that by signing the indenture he should discharge the auctioneers from their guaranty. He thought the note belonged to them, because they had guarantied the sales. He was mistaken in his premises, and a declaration made under a mistake is not binding. *Hall* 175
v. *Huse*, 10 Mass. R. 39. The defendant was not injured by this declaration of the plaintiff; he obtained credit, but this was no injury.

PARKER C. J. delivered the opinion of the Court. *April 6th*
The objection taken at the trial, to the testimony of the witnesses on the part of the plaintiff, has not been insisted on.

The evidence, we think, justifies the verdict; for it proves that both Whitwell, Bond and Seaver, and the plaintiff, acted under a mistake, in regard to the supposed guaranty of this note. It not being guarantied, the plaintiff's right cannot be injured by the act of Whitwell, Bond and Seaver, in signing the indenture. The note was not discharged by it, they having no authority over it.

Nor do we think that the plaintiff is prevented, by any thing in the nature of an estoppel, from claiming the note as his property. It does not appear that the assignment was made, or any act done prejudicial to the defendant, in consequence of any declarations by the plaintiff in regard to the note.

The surrejoinder of the plaintiff, which is specially demurred to, is bad in averring two distinct and independent grounds in answer to the rejoinder, either of which is traversable, and would have been conclusive for the plaintiff if found in his

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favor. But the plaintiff may amend, on payment of the costs of that issue from the time of filing the surrejoinder.

THADDEUS ALLEN *versus* THOMAS CARTER.

A judgment against the tenant in a writ of entry brought in the name of one of several co-heirs at their joint expense, to try the title, will not enure to the benefit of another of those co-heirs in an action of trespass for mesne profits.

A constructive ouster by an heir claiming the whole estate under a supposed devise, will not sustain an action of trespass brought against him by a co-heir.

TRESPASS for mesne profits. The parties stated a case.

John Ballard senior owned the estate. He died March 2, 1824, testate, leaving six heirs at law, the wife of the plaintiff being one of them and the wife of the defendant another. At
176 the time of his death, the defendant, with his family, occupied the estate; and he continued so to occupy until September 23, 1824, supposing that he owned, in right of his wife as one of the residuary legatees, one third of the estate. He then purchased the other two thirds of the other residuary legatees, and supposed he was the lawful owner of the whole; and from that time he claimed exclusive right to the whole under the will and the deeds. It was not until after he had made this purchase, that any intimation was given him that the other children of the testator supposed he died intestate as to this messuage; and no demand for rent or claim of interest in this estate was made by the plaintiff until October, 1825, when he asserted and claimed his wife's right therein. The heirs whose rights were denied having bound themselves to pay, by contribution in proportion to their several interests, the costs of all suits which might be necessary to establish their several titles, by mutual agreement between them a suit was brought on July 24, 1826, by the minor children of William Ballard, a son of the testator, to recover from the defendant one sixth part of this estate; and on August 20, 1827, it was determined that the testator died intestate as to this messuage, and the defendant was defaulted in that action. (See 5 Pick. 112.) In February, 1828, the defendant petitioned for partition, neither the plaintiff nor any other person objecting, and commissioners

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were appointed, whose return, dated June 5, 1828, was accepted by the Common Pleas in July following. On March 3, 1828, the plaintiff received notice that the defendant was holding only as a tenant in common, and therefore he would pay no rent. Prior to the meeting of the commissioners, neither the plaintiff nor his wife ever took formal possession of any part of the messuage, or entered thereon declaring their intention to make an actual entry; but both were served with an order of notice on the petition for partition, and at the meeting of the commissioners both the plaintiff and the defendant were present with them on the estate, took part in the proceedings, and the plaintiff, in right of his wife, claimed one sixth part of the estate. The defendant never received any rent from the estate, but occupied it from the second of March, 1824, to the time of the partition.

The questions were, whether the plaintiff was entitled to recover any rent in this action; and if so, for what length of time. 177

Sumner contended that the exclusive claims made by the defendant on the 2d of March and 24th of September, 1824, were disseisins of the plaintiff, which gave him a right to demand mesne profits; that under the agreement made by the heirs, the judgment in the writ of entry would avail this plaintiff as much as if he had been the immediate demandant; and that he was entitled to the mesne profits from March, 1824, to the time of the partition in 1828. Adams on Ejectm. 56, 335; *Fishar* v. *Prosser*, Cowp. 217; *Cummings* v. *Wyman*, 10 Mass. R. 464; *Kennebeck Purchase* v. *Springer*, 4 Mass. R. 416; *Jackson* v. *Preston*, 13 Johns. R. 406; *Jackson* v. *Ellis*, 13 Johns. R. 118; *Emerson* v. *Thompson*, 2 Pick. 487; *Baron* v. *Abeel*, 3 Johns. R. 475. *March 20th*

Sohier, for the defendant.

Per Curiam. We do not see any principle on which the action can be maintained for any sum. *April 6th.*

Trespass for mesne profits does not lie. The plaintiff shows no judgment for possession; he brought no action; and he was not privy to the writ of entry brought by the other heirs. An agreement to abide the event of a suit does not create a privity.

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Allen v. Carter.

The common action of trespass does not lie, as the plaintiff was not in possession, actual or constructive. There was no pernancy of profits.

It is said that the possession of the defendant under a supposed devise, claiming the whole estate as against the heirs at law, amounts to an ouster.[1] It may for some purposes; as to sustain a writ of entry; but such a fictitious ouster is not sufficient to support an action of trespass. The plaintiff had never had possession.

The defendant had a right to be in possession as a tenant in common, and the plaintiff's only remedy, if any, would be an action for use and occupation. But there are difficulties in regard to that, as appears by the case of *Sargent* v. *Parsons*, 12 Mass. R. 149.

Plaintiff nonsuit.

178 AMASA G. SMITH *et al. versus* The Proprietors of the FIRST CONGREGATIONAL MEETINGHOUSE IN LOWELL.

Counts on a special contract under seal, and a *quantum meruit* for labor done and materials found, may be joined in an action of debt.

An action of debt or assumpsit may be maintained upon an implied promise, for labor done and materials found under a special contract which has not been performed on the part of the plaintiff.

A corporation may be bound by an implied promise.

THIS was an action of *debt* to recover a balance alleged to be due to the plaintiffs for building a meetinghouse for the defendants, who were a corporation, and for extra-work and materials about the same. On the 30th of May, 1827, a contract under seal was made by the parties, by which the plaintiffs, among other things, "covenant, promise and agree, that they will, on or before the 1st of December next after, in a good and workmanlike manner, substantially erect and build, and, except the cellar and basement story, completely finish a meetinghouse for said proprietors, according to a plan exhibited," &c.

[1] See *Towle* v *Ayer*, 8 N. Hamp. R. 63

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"The roof shall be made according to the plan before referred to, well strengthened, and covered with slate, in a thorough and proper manner," &c. "And it is agreed that the materials of every kind shall be good and well seasoned, and that the whole shall be completed in a workmanlike manner." And the defendants agreed to pay 8000 dollars, in instalments, for building the meetinghouse. The house had been built by the plaintiffs, and been occupied by the defendants as a place of public worship, but without prejudice to their rights.

The declaration contained nine counts; — 1. The first sets forth the contract, avers performance on the part of the plaintiffs and alleges that the defendants have not paid the sum of 8000 dollars, nor any part thereof, excepting the sum of 6004 dollars, *per quod actio accrevit*. 2. The second is the same as the first, except that it sets forth that the contract was made by a committee on behalf of the defendants. 3. The third is similar to a count in *indebitatus assumpsit* for work, labor, 179 care, diligence, &c. and materials found. 4. The fourth is *quantum meruit* for labor and materials to the value of 3000 dollars. 5. The fifth is similar to a count in *indebitatus assumpsit* for money paid, laid out and expended, to the same amount. 6. The sixth is for interest. 7. The seventh is upon an account stated. 8. The eighth counts upon the contract, as in the first, except that it avers the whole sum of 8000 dollars to be due. 9. The ninth is like the eighth, except that it alleges that the defendants did not pay the two last instalments stipulated for in the contract, viz. 1000 dollars when the outside of the meetinghouse was finished, and 1000 dollars when the building was completed, *per quod actio accrevit* to recover 2000 dollars, parcel of the sum of 8000 dollars. The defendants pleaded generally to these counts *nil debet*; on which issue was joined.

The defendants objected to the joinder of these counts, on the ground that, in this Commonwealth, debt on simple contract does not lie for work and labor, and a *quantum meruit* thereon. *Wilde* J., before whom the action was tried, reserved this question.

The defendants introduced evidence, that the roof of the house was constructed in an unskilful and unworkmanlike man-

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ner, and that some of the materials were not of the quality agreed upon in the contract.

The defendants objected to the introduction of any testimony on the part of the plaintiffs under the counts for labor done, and materials found, contending that under the counts founded on the contract such evidence ought not to be admitted But the judge ruled, that the plaintiffs might show that they were reasonably entitled to recover for labor and materials, independently of the contract, and that the defendants might introduce evidence to rebut the plaintiffs' evidence and show that they had derived no benefit from the plaintiffs' labor and materials; and the testimony was introduced accordingly. The testimony of the defendants tended to show, that the roof was so improperly constructed and of so bad materials, that it must be taken down, and so was of no value to them. Upon this point the judge charged the jury, that if the roof ought to be taken down, and that over and above the value of
180 the old materials, it would cost the defendants as much to take it down and rebuild it, as remained due upon the contract, provided it had been fulfilled on the part of the plaintiffs, they should find for the defendants; but if the roof need not be taken down, but might be strengthened and supported, they might deduct from the sum so remaining unpaid, the amount it would cost to make the roof safe and substantial, and find the balance for the plaintiffs; but if they thought there was reasonable ground to doubt whether the roof could be sufficiently strengthened, they ought to decide against the plaintiffs; whose duty it was to satisfy them on this point.

The jury found a verdict for the plaintiffs, for 743 dollars, the amount due on the contract, had it been complied with, being 1996 dollars.

If the counts were improperly joined, or if the evidence to prove the *quantum meruit* was improperly admitted, after it appeared that the special contract had not been performed, the verdict was to be set aside and a new trial granted.

March 21st. *S Hubbard*, for the defendants, said that though there were *dicta* that an action of debt would lie in England on simple contract for work done and materials found, there was no decision to that effect in this Commonwealth, nor any such usage;

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and in 5 Dane's Abr. 101, it is said that this action is gone into disuse in England, because the defendant has a right to wage his law, and where wager of law could not be, they decided that debt would not lie. Here a corporation cannot swear, and so they are deprived of one of the benefits to which the defendant is entitled in an action of this nature. Debt on simple contract does not lie against an administrator, because he cannot wage his law. *Barry* v. *Robinson*, 4 Bos. & Pul. 293. An infant cannot wage his law, and if he sues, the defendant cannot, and so debt on simple contract does not lie in either case. In *Lane* v. *Smith*, 2 Pick. 283, the Court say it is not settled that debt will lie on a bail bond.[1] This being a suit against a corporation, which can be bound only by vote, is a ground of objection to a claim on a mere implied promise. Debt must be brought for a sum certain.

As to the next point, evidence ought not to have been admitted on the indebitatus counts, the special contract not being waived, rescinded or performed. *Ellis* v. *Hamlin*, 3 Taunt. 181
52; *Felton* v. *Dickenson*, 10 Mass. R. 289; *Seymour* v. *Bennet*, 14 Mass. R. 266. While the special agreement remains in force, the party cannot have recourse to an implied contract. The counts on the contract cannot be supported, because the work was not performed in compliance with the contract, and it would be dangerous to depart from that; for if a man were to make a bad contract, he would abandon it, and claim a *quantum meruit*. *M'Cormick* v. *Connoly*, 2 Bay, 401.

Curtis, for the plaintiffs, to show that the counts may be joined, cited 1 Chit. Pl. 106, 107; *Union Cotton Manufactory* v. *Lobdell*, 13 Johns. R. 462; *Coryton* v. *Lithebye*, 2 Wms's Saund. 117, note. As to the objection on the ground of a right of wager of law, this is out of use. [See *King* v. *Williams*, 2 Barn. & Cressw. 538.] An administrator is obliged to answer in debt on a lease, so that this objection to the form of the action does not hold.

As to the other point, reason and the weight of authority are in favor of the action, the defendants having been benefited by the materials found and labor performed by the

[1] Debt does not lie on a bail bond in this State. *Crane* v. *Keating*, 13 Pick. 339.

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plaintiffs. *Broom* v. *Davis*, 7 East, (Am. ed.) 480, note *Farnsworth* v. *Garrard*, 1 Campb. 38; *Templer* v. *M'Lachlan*, 5 Bos. & Pul. (Day's ed.) 136, note; *Keyes* v. *Stone*, 5 Mass. R. 391; 2 Stark. Ev. 97, 98; *Taft* v. *Montague*, 14 Mass. R. 282.

April 6th. PARKER C. J. delivered the opinion of the Court. It appears by the English authorities cited, that an action of debt is a common law remedy on a simple contract, as well as on a specialty, and that it lies even on a *quantum meruit* and *quantum valebant*. It is much disused on account of the right which it gives to the defendant to wage his law. But in this country, where there is no wager of law, there is no reason why this action should be disused.

In regard to the question, whether the plaintiffs can maintain their action of *indebitatus assumpsit*, they having made a special contract which was not performed, we think the preponderance of authorities is in favor of such action. Having had occasion recently to look into this question in another case, we omit any discussion of it in this.[1] [See *Hayward* v. *Leonard*, 7 Pick. 181.]

182 That the defendants are a corporation, makes no difference, as they may be sued on an implied promise as well as individuals.[1]

Judgment according to verdict.

[1] See *Norris* v. *School District*, 3 Fairfield, 293; *Hollinsead* v. *Mactier*, 13 Wendell, 276; *Wright* v. *Wright*, 1 Littell, 181; *M'Cormick* v *Connoly*, 2 Bay, 401; *Wadleigh* v. *Sutton*, 6 N. Hamp. R. 15; *Ligget* v. *Smith*, 3 Watts, 33; *Jewett* v. *Weston*, 2 Fairfield, 346; *Newman* v. *M'Gregor*, 5 Hammond, 351; *Hayden* v. *Madison*, 7 Greenleaf, 76; *Dubois* v. *Del. and Hudson Canal Co.*, 4 Wendell, 285; *Morford* v. *Ambrose*, 3 J. J. Marshall, (Ken.) 690; *Phelps* v *Sheldon*, 13 Pick. 50; *Sebastian* v. *Thompkins*, 6 Littell, 198; *Merrill* v. *Ithaca and Oswego Railroad Co.*, 6 Wendell, 589; *M'Intire* v. *Morris*, 14 Wendell, 90.

[1] See *Baptist Church* v. *Mulford*, 3 Halsted, 182; *North Whitehall* v *South Whitehall*, 3 Serg. & Rawle, 117; *Bank of Columbia* v. *Patterson*, 7 Cranch, 297; *Waring* v. *Catawba Co.*, 2 Bay, 10; *Chesapeake &c. Canal Co.* v. *Knapp*, 9 Peters, 541; *Beverly* v. *Lincoln Gas Light and Coke Company*, 6 Adolph. & Ellis, 829, and 33 Eng. Com Law Rep. 222.

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JOHN PHILLIPS *versus* HEZEKIAH EARLE *et al.*

A person delivering a package to a common carrier to be transported, is under no obligation to state the value of the articles it contains, unless an inquiry is made on the subject.

But it *seems*, that in case an inquiry should be made and a false answer given, or any fraudulent attempt be made to conceal the real value of the articles from the carrier, he would not be liable for their value, in case of loss without his default

Where a package was delivered to the agent of a stagecoach company, at the post-office, where the stage was standing, and not at the office of the company, to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way-bill, he having previously directed the person who had the care of the package to bring it to the post-office; and the package was lost before reaching Hartford; it was *held*, that the owners of the coach were liable to the owner of the package for its value, the delivery at the post-office being with the assent of their agent.

The package was directed to a person at Hartford, who was not there at the time when the coach arrived, nor for several days after; it was *held*, that as the package never in fact arrived, the absence of the person to whom it was directed, did not exonerate the owners of the coach from their liability.

THIS was an action against the defendants, who were owners of the New York mail coach, as common carriers, to recover the value of a package of laces, which had been sent by the plaintiff to one of the defendants' coaches to be transported to Hartford.

It appeared from the evidence at the trial, that the package was addressed to Henry Phillips, at Morgan's House, Hartford, and that it was entered on the books and way-bill of the defendants by their agent, and was delivered to the agent of the defendants while the coach was standing at the door of the post-office in Boston on July 10, 1828, and that he delivered it to the driver of the coach. The package, if safely carried, would have arrived at Hartford on July 11, 1828, in the morning. It was a box about a foot and a half long, and not quite so wide, covered with paper. The porter who carried the box to the coach, had just before carried it to the stagecoach-office in Hanover street, but not having money with him to pay for the transportation, he was told by the agent that it could be taken in at the post-office when the coach stopped there. He accordingly went and got the money (fifty cents) from the plaintiff, and delivered the package and paid for the transportation at the post-office. The defendants' agent at first demand- 133

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ed seventy-five cents, but on the porter's saying that the package was light and that he thought that high, the agent agreed to take the package for fifty cents. Nothing was said of the value of the package by the porter who carried it, and no questions were asked on that point on behalf of the defendants.

Henry Phillips, to whom the package was directed, did not arrive in Hartford until the 15th of July; he then made inquiries at Morgan's and elsewhere, but could not find the package, and never received it. It was also proved that t never arrived at Hartford. The defendants at other times had carried packages to Hartford for the plaintiff.

The counsel for the defendants contended, that as common carriers were by law insurers of the property delivered to them, against all risks except the act of God and public enemies, it was the duty of the plaintiff to give some information of the contents and value of the package, that they might demand an adequate compensation for the great risk, as well as for the transportation, and take a greater than ordinary degree of caution; and that the concealment of the value was a fraud on the carriers, and ought to deprive the plaintiff of all right to recover, or at least to recover beyond the probable or apparent value of a package of the size and appearance of the one delivered. He also contended, that the package ought not to have been delivered at the post-office in the manner before stated; and that no person being at Hartford until the 15th of July, to receive the package or give early notice of its miscarriage, the defendants were thereby exonerated.

The judge instructed the jury, that the defendants, having accepted and undertaken to carry the package for the plaintiff, were answerable for the value of its contents, unless destroyed by the act of God or the public enemy; that as no inquiry was made by the defendants as to the value of the package when they received it, the plaintiff was not bound to say any thing of its contents; though if the jury thought the
184 transaction was an intentional fraud on the part of the plaintiff, they should find a verdict for the defendants. The judge also instructed the jury, that though, if the package had actually arrived at Hartford and been lost afterwards, the defendants would have been exonerated, yet the mere circumstance of

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Henry Phillips's being absent was of no consequence, as the package never in fact arrived.

The jury returned a verdict for the plaintiff. If the instructions were erroneous, a new trial was to be granted; otherwise judgment was to be entered on the verdict.

March 24th

S. D. Parker, for the defendants, in order to show that they ought to have been informed of the value of the package, cited *Dwight* v. *Brewster*, 1 Pick. 54, *Gibbon* v *Paynton*, 4 Burr. 2298; *Beck* v. *Evans*, 16 East, 244; *Levi* v. *Waterhouse*, 1 Price, 280; *Harris* v. *Packwood*, 3 Taunt. 264; *Nicholson* v. *Willan*, 5 East, 510; 2 Stark. Ev. 340, note, *Tracy* v. *Wood*, 3 Mason, 135. The beating down the price by the person who brought the package was equivalent to a representation that it was of small value.

Curtis, *contrà*, said that the English cases did not apply, as these defendants had never given any notice that unless the value of the goods sent was communicated to them, they would not be liable beyond a certain amount. The plaintiff was under no obligation to state the value of the package unless asked; it is sufficient that he did not fraudulently conceal it. *Brook* v. *Pickwick*, 4 Bingh. 218; *Batson* v. *Donovan*, 4 Barn. & Ald. 21. The delivery at the post-office, was as effectual as if it had been made at the stagecoach-office. A delivery even on the course of the journey would have rendered the owners of the coach liable. 2 Stark. Ev. 334.

April 6th

PARKER C. J. delivered the opinion of the Court. The box which was lost was delivered to the agent of the defendants, and they therefore became liable as common carriers for the safe transportation and delivery of it, unless the objections stated by their counsel, or some of them, are valid.

First, it is said that the defendants ought to have been informed of the value, in order that they might have been aware of the necessity of extraordinary care. But, by the authorities, this was not necessary, there being no notice given by the defendants of any limitation of their liability. They might have 185
asked the quality and value of the contents of the box, and if they had, any false answer would have been fraudulent and have excused them. Or if there had been any concealment or deception, the same consequence would have followed. The

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very form and appearance of the box, and its peculiar lightness, and the manner in which it was secured, were strong indications that the contents were valuable. The defendants therefore, if they wished to increase the compensation on account of the value, ought to have been upon their guard and made the proper inquiries.[1]

Then it is objected, that the box should have been entered at the office or place of business of the defendants, in order that it might have been booked there. But the evidence shows the assent of the defendants that it should be delivered at the post-office. The receipt of it by their agent, who entered it on the way-bill, takes away whatever force there might otherwise have been in the objection.

And in regard to the objection, that Henry Phillips, to whom the box was directed, was absent from Hartford, it might have been valid if the goods had been safely transported to that place and were lost afterward for want of some one to receive and take care of them; but being lost on the way, the defendants had failed to perform their contract and had become chargeable.

We do not see cause, on account of any of the objections, to set aside the verdict.[2]

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[1] See *Brooks* v. *Pickwick*, 4 Bingh. 218; *Orange County Bank* v. *Brown* 9 Wendell, 25, 115; *Hollister* v. *Newlan*, 19 Wendell, 234; *Cole* v. *Goodwin*, 19 Wendell, 251; Story's Comm. on Bailments, 362; *Sewall* v *Allen*, 6 Wendell, 349.

[2] See *Shelden* v *Robinson*, 7 N. Hamp. R. 157; Story's Comm. on Bailments, 325, 326.

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BOSTON TYPE AND STEREOTYPE FOUNDERY *versus* WILLIAM H. WALLACK.

A certificate obtained under an insolvent law of one State, which declares the person of the insolvent to be exempted from arrest for debts contracted previously to his assignment, is no bar to an action on such a debt, commenced by arresting him, in another State.

W, a resident in New York, made at that place a negotiable note, in payment for goods, to an agent of a corporation established in Massachusetts, the agent also residing in New York, and W knowing the contract to be made on behalf of the corporation. W afterward assigned his property and obtained a certificate under the insolvent laws of New York, which declared his person to be exempted from arrest for debts contracted previously to his assignment. *Held*, that this certificate was no bar to an action brought by the corporation against W in Massachusetts, which was commenced by arresting him; and that the certificate could not affect the judgment or form of the execution in Massachusetts.

Whether W has any remedy for being arrested on mesne process or on execution in Massachusetts, *quære*.

THIS was an action of *assumpsit* on a promissory note, and was submitted to the Court on the following statement of facts.

On the 4th of October, 1826, the defendant, who was a resident in the city of New York, signed the note on which this action was brought. It was for 273 dollars 50 cents, payable in six months to the order of A. T. Freeman, a citizen of New York, and was indorsed by Freeman for the defendant's accommodation. The note was given to James Conner, the agent of the plaintiffs in New York, for types and other articles, the property of the plaintiffs, purchased by the defendant of Conner. The purchase was made by an agent of the defendant, who knew at the time that the articles were the property of the plaintiffs. Notes given to Conner as the plaintiffs' agent, by persons residing in New York, were usually paid there; but no special agreement was ever made that that should be the place of payment.

Before the note became due, the defendant failed, and he afterward, on August 27, 1827, assigned his property for the benefit of his creditors, complied with the other provisions of the New York insolvent laws, and obtained from the recorder of the city of New York a certificate or decree, which declared the person of the defendant to be exempted from im-

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prisonment for debts contracted previously to the time of making his assignment. The defendant and Conner continued to reside at New York, and the note remained there until after August 27, 1827. It was afterward delivered to the plaintiffs; who finding the defendant in Boston, he having come there for a temporary purpose, arrested him in this suit, when he gave bail.

The plaintiffs were to be nonsuited, or the defendant defaulted, or any other disposition made of the case, according to the opinion of the Court.

March 28th. *H. H. Fuller*, for the plaintiffs.

Peabody, for the defendant.

April 6th. *Per Curiam.* The certificate pleaded goes only to the discharge of the defendant from personal arrest on account of debts, and therefore is no bar to the action.[1] Nor can we allow it to have any effect upon the judgment here, or upon the form of the execution. If the certificate is available in this State to protect the defendant from personal arrest, his remedy is in another form, when he shall be arrested.

Henry Bass, Executor of Henry Bass, *versus* William Bass.

An account that is closed, is not in consequence necessarily a settled account.

An account "concerning the trade of merchandise, between merchant and merchant," is not barred by the statute of limitations, although none of the items are within six years before the action was brought.

The death of one of the parties to such an account, does not operate as a settlement or statement of the account, so as to bar it by the lapse of six years from the time of his death.

Whether accounts concern "the trade of merchandise between merchant and merchant," is a question of fact to be decided by the jury.

Such accounts are not merely accounts for merchandise bought and sold between the parties, but also include demands for money growing out of the trade of merchandise.

The lapse of twenty years from the time of a debt's becoming due, does not operate as an absolute bar to its recovery, but affords a presumption of payment; which presumption may be rebutted by evidence, tending to show that payment has not in fact been made.

[1] See 2 Kent, (3d ed.) 402, note *a* and cases cited; Story's Comm. on Confl of Laws, 478, 480

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THIS was assumpsit for goods sold, money laid out and expended, lent and accommodated, and had and received.

The defendant pleaded the general issue, which was joined. He also pleaded *actio non accrevit infra sex annos.* To this the plaintiff replied, that the plaintiff's testator and the defendant were merchants, and that the causes of action set forth in the declaration, arose out of the mutual dealings and accounts of the testator and the defendant as merchants, and wholly concerned the trade of merchandise. The defendant in his rejoinder traversed these allegations; and issue was joined upon this traverse.

The following was the bill of particulars filed by the plaintiff, with the omission of some charges which were abandoned by him at the trial.

William Bass in account current with the estate of Henry Bass.

Dr.

1803.	To cash paid your draft to M'Cardier	582·50
Nov. 19.	" cash paid for 3142 lbs. pepper shipped to you by Capt. Mulsey Oct. 1803	613·61
1804.		
July 14.	" balance of your account settled with H. Bass & Co. this day	644·32
" " "	1000 pieces of nankins of H. Bass & Co.	870·00
Oct. 29.	" cash paid your draft to John Speyer	341·25
Nov. 10.	" " " " " to N. Lawrence	884·60
" 26.	" " " " " to R. S. Hackley & Co.	665·65

Cr.

1804.		
July 2.	By George Bass's note on me in your favor of this date	281·74
Dec. 31.	" cash received for your draft on Benj. and Geo. Williams, Baltimore	356·60
" " "	cash received for debenture certificates on nankins	72·37

With regard to the first item of charge, the plaintiff proved, that in September, 1803, the defendant drew his bill in favor of one M'Cardier on the testator, to pay certain advances made by M'Cardier to the defendant, and that the testator paid the bill. As to the second item, the plaintiff proved that the testator, in November, 1803, consigned a quantity of pepper to the defendant for sale, and that the defendant, who was then in France, had transmitted an account of sales and promised to

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pay the balance on coming home. The plaintiff proved as to the third item, that it was a balance of account due from the defendant to Henry Bass & Co. which was, in July, 1804, transferred to the testator's debit by H. Bass & Co. with the defendant's consent. The plaintiff proved, as to the fourth item, that the nankins were, in July, 1804, sold by H. Bass & Co. to the defendant on the testator's credit, and charged to the testator by H. Bass & Co. by agreement of the parties. The three remaining items were proved to be drafts drawn in October and November, 1804, by the defendant, on H. Bass & Co., to pay for goods purchased by him at New York on his own account, which bills were accepted and paid by them, and then charged to the testator in the company's books, with his consent, and according to an understanding between the parties before the purchases were made. The drafts were produced, and the defendant's name was struck out in all of them. It appeared from the evidence, that the defendant had resided in France for many years after the date of the charges in the account.

The defendant then proved, that the testator died in 1813; that the defendant had been in Boston since the date of the last item, at different times, particularly in 1805 and 1811; that in 1810 he had funds in the hands of H. Bass & Co. exceeding 4000 dollars; and he exhibited an account settled between H. Bass & Co. and himself in 1807, showing a balance due to him of 900 dollars.

The plaintiff produced the will of Henry Bass, who was the father of the defendant, by which the income of his real and personal estate was given to his wife for life, and the remainder specifically devised, a part of it being given to the defendant The widow received the income accordingly until her death, October 30, 1826.

The defendant contended, that an account when stated, ceased to be an account between merchant and merchant, within the statute, which applies only to open and current accounts; that the death of either party closes and states the account; and thus, that no action having been brought within six years after the testator's death, the suit was barred by the statute.

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The defendant further contended, that the dealings in relation to merchandise, to be brought within the statute, must be mutual; and that as the items to his credit in the account, consisted merely of cash, the case was not within the exception in the statute. But the judge ruled otherwise.

The defendant also contended, that as all the items of the account, except two, were mere payments of money or advances by the testator to or for the defendant, the account did not relate to the trade of merchandise. But the judge was of a different opinion; and he instructed the jury, that the question whether the transactions between the parties were the dealings of merchants, and whether the accounts arising out of those dealings were merchants' accounts, and whether they related to the trade of merchandise, were questions of fact for them to decide.

The defendant then contended, that the lapse of time was presumptive evidence of payment by him. The judge instructed the jury, that after twenty years the presumption of law was, that the account had been settled, and any balance paid; but that this presumption might be rebutted by evidence tending to show that the same had not been so settled and paid; and that whether this had been done in the present case, was for the jury to determine.

The jury having found a verdict for the plaintiff on both issues, the defendant moved for a new trial, on the ground that the verdict was against evidence, and also on account of the instructions of the judge.

March 12th. *Shaw* and *Bartlett*, for the defendant. Where an account is stated, it does not fall within the exception in the statute, as to merchants' accounts; and after all dealings between the parties have ceased for more than six years, merchants' accounts are no longer open, but barred by the statute. *Welford* v. *Liddel*, 2 Ves. sen. 400; *Webber* v. *Tivill*, 2 Wms's Saund. 127, note 6; 5 Dane's Abr. 394; *Ramchander* v. *Hammond*, 2 Johns. R. 200; *Coster* v. *Murray*, 5 Johns. Ch. R. 527; *Murray* v. *Coster*, (*S. C.*) 20 Johns. R. 576, *Farrington* v. *Lee*, 1 Mod. 269; *Farrington* v. *Lee*, 2 Mod. 312; *Barber* v. *Barber*, 18 Ves. 286; *Duff* v. *East India Company*, 15 Ves. 198.

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The death of Henry Bass stated and closed the account, and the six years must have then begun to run, if not before. 5 Dane's Abr. 395. Case before S. J. C. Mass. at Ipswich 1800, Story's Pl. 91. The law is the same in Scotland. Accounts are there barred by the lapse of three years from a cessation of dealings, or from the death of one of the parties. 1 Bell's Com. 251.

After a certain lapse of time, accounts will be presumed to have been rendered, and the statute will begin to run. *Topham* v. *Braddick*, 1 Taunt. 571. In the present case the last item in the account was in 1804, and the action was not commenced until 1826.

The accounts in this case do not concern the trade of merchandise between merchant and merchant, within the meaning of the statute. (*St.* 1786, *c.* 52, § 1.) There are only three items on the credit side and those are all of cash. And as to the charges on the other side, the first and three last are all merely advances made by the testator; the second was a settled account; *Sherman* v. *Sherman*, 2 Vern. 276; *Freeland* v. *Heron*, 7 Cranch, 147; and the third and fourth, though, as it regards H. Bass & Co. they might originate in the trade of merchandise, yet with regard to the testator were mere advances. Surely every case of set-off is not to be considered as mutual dealings between merchants. *Webber* v. *Tivill*, 2 Wms's Saund. 126; *Murray* v. *Coster*, 20 Johns. R. 582; *Cheeveley* v. *Bond*, 1 Show. 341.

The verdict was against evidence. After the lapse of twenty years, a debt, even if by bond, is presumed to be paid. *Thompson* v. *Skinner*, 7 Johns. R. 556; *Cope* v. *Humphreys*, 14 Serg. & Rawle, 21; *Giles* v. *Baremore*, 5 Johns. Ch. R. 550. It was right that this presumption should be submitted to the jury; but the instruction should have been, that if they found that twenty years had elapsed, the demand was barred. *Palmer* v. *Dubois*, 3 Const. Rep. S. C. 180.

Sullivan, for the plaintiff. It is admitted that a stated account is not within the exception of the statute, but the account in this case was not stated or settled, but continued open. A closed account is not a stated account. *A'Court* v. *Cross*, 3 Bingh. 329; *Mandeville* v. *Wilson*, 5 Cranch 15; *Foster* v

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Hodgson, 19 Ves. 185. Courts are now dissatisfied with the excessive refinements which have been made on the statute of limitations. *Bangs* v. *Hall*, 2 Pick. 368; *Scales* v. *Jacob*, 3 Bingh. 638; *Bell* v. *Morrison*, 1 Peters's Sup. Ct. R. 351.

The items in the account evidently relate to mercantile transactions, and the parties were merchants. Beawes's Lex. Merc. 29. If there could be any question on these points, the verdict of the jury has settled it.

The lapse of twenty years is not an absolute bar; that period was adopted by analogy to the statute of limitations, and only affords a presumption of payment, which presumption may be rebutted by evidence. *Oswald* v. *Legh*, 1 T. R. 271; *The Mayor of Kingston* v. *Horner*, 1 Cowp. 109; *Hillary* v. *Waller*, 12 Ves. 266. The question was properly left to the jury; and the circumstances of the relationship of the parties, the long absence of the son, and the provisions of the will, sufficiently rebutted any presumption of payment.

PARKER C. J. delivered the opinion of the Court. It was decided in a former stage of this action, that merchants' accounts, as described in the statute of limitations, are excepted from the operation of that statute, and upon a revision, we are satisfied with that decision. *June 27th.*

The case as now reported presents the question, whether the demand sued, if originally a merchants' account, has ceased to retain that character from any cause appearing in the report; and whether all or any of the items in the account are in fact of a nature to come within that description.

It is insisted that the death of the testator more than six years before the commencement of the suit, closed the account between the parties, so that from that time the balance then existing became liable to the operation of the statute of limitations, like an *account stated*; which, according to all the authorities, ceases to be a merchants' account, so far as respects the exception in the statute. There are no authorities for this position, except a loose dictum in 5 Dane's Abr. 395, founded upon a supposed decision of this Court stated in Story's Plead. 91. The position itself is inconsistent with a subsequent position of the same learned authority, in 6 Dane's Abr. 152, where it is laid down, that an account closed is not a stated

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account. Death closes accounts in one sense, that is, there can be no further additions to them on either side; but they remain open for adjustment and set-off, which is not the case in an account stated; for that supposes a rendering of the account by the party who is the creditor, with a balance struck, and an assent to that balance, expressed or implied; and thus the demand is essentially the same as if a promissory note had been given for the balance.

We see no authority for deciding, that the death of one of the parties, the account remaining unsettled, shall so change the nature of the demand, as to take it out of the exception in the statute.

In regard to the objection, that the items of the account are not such as, according to the statute, are the proper component parts of merchants' accounts, we think it is not tenable. The words are, "other than such accounts as concern the trade of merchandise between merchant and merchant."

It was not intended to limit this exception to accounts for goods, wares and merchandise bought and sold between the parties; but all demands for money growing out of the trade of merchandise, between merchant and merchant, which are the subject of account, are included. We see no item in the account sued, on which the verdict has been given, which may not fairly be presumed to have arisen from the relation of the parties as merchants.

And we think it was properly left to the jury, to determine the character of the account, and whether it concerned the trade of merchandise.

Judgment according to verdict.[1]

[1] See *Union Bank* v. *Knapp*, 3 Pick. (2d ed.) 113, 114, note 1; *Blair* v. *Drew*, 6 N. Hampsh. R. 238; Revised Stat. c. 120, § 5

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SELDEN BRAYNARD *versus* JOSIAH T. MARSHALL

A discharge obtained under an insolvent law of one of the United States, is no bar to an action brought by a citizen of another State against the insolvent, even upon a contract made between them in the State where the insolvent law was passed.

Therefore where P, who was residing in New York with the intention of becoming a citizen of that State, sold goods there as the agent of B, a citizen of Massachusetts, to M, a citizen of New York, taking for them M's note payable to P or order in three months, which P immediately passed to B; and afterwards M obtained a discharge under the insolvent law of New York; in an action by B as indorsee against M as maker of the note, it was *held*, that the discharge obtained in New York was no bar to the action.

THIS was assumpsit by the plaintiff, as indorsee, against the defendant, as maker of a promissory note, dated at New York, May 24, 1826, by which the defendant promised to pay William Plympton, or order, 269 dollars in three months and grace. The case was submitted to the Court on a statement of facts agreed by the parties.

The plaintiff is a citizen of Massachusetts, and has never been an inhabitant of New York. The defendant, at the time the note was given, was a resident in the city of New York, doing business there as a merchant, and has continued to reside there ever since. Plympton, the payee, went to New York in February, 1826, with an intention to become an inhabitant or citizen of New York, and his family went there in May following; he continued to reside there for nine or ten months. The note in suit was given by the defendant to Plympton, in payment for goods sold to him, which goods had been consigned to Plympton by the plaintiff for sale; and the note was on the same day handed to the plaintiff's clerk. It was agreed, that if Plympton was a competent witness, he would testify, that the defendant was informed at the time the note was given, that it was to be immediately handed to the plaintiff, but not that the plaintiff was interested in the goods. At the time the note became due, it belonged to Thomas Darling, a citizen of Massachusetts, to whom it had been indorsed by Braynard; and Wheelwright & Johnson of New York, the agents of Darling, caused it to be protested. Braynard, as indorser, afterward paid the amount of the note to Darling. The defendant, on March 3, 1827, obtained a discharge under the insol-

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vent laws of New York; and it was admitted that the discharge was obtained fairly and in pursuance of the laws of New York.

The plaintiff was to become nonsuit, or the defendant to be defaulted, according to the opinion of the Court.

The statute of New York, under which a discharge is claimed, was passed April 12, 1813, and the discharge under it releases the insolvent from all debts "due at the time of the assignment, or contracted before that time, though payable afterwards."

March 16th. *Bartlett*, for the plaintiff. The indorsement of the note to the plaintiff, which created a new contract between the indorsee and the maker, was made before Marshall obtained his discharge; or rather, since Plympton was merely acting as agent of the plaintiff, the contract originally created was between the plaintiff and the defendant. *Scrimshire* v. *Alderton*, 2 Str. 1182. The discharge, therefore, under the laws of New York, cannot defeat this action brought by a citizen of Massachusetts. The insolvent laws of a State cannot discharge a contract made with a citizen of another State. *Ogden* v. *Saunders*, 12 Wheat. 358; *Baker* v. *Wheaton*, 5 Mass. R. 509; *Watson* v. *Bourne*, 10 Mass. R. 337. It is now well settled, that a bankrupt or insolvent law cannot have an extra-territorial operation. Thus the assignment in bankruptcy under a foreign law, will not pass property in this country, against the attachment of an American creditor. 2 Kent, 330; *Blake* v. *Williams*, 6 Pick. 286.

Cooke, for the defendant. The case of *Blanchard* v. *Russell*, 13 Mass. R. 1, is directly in point to show that a discharge in New York defeats the rights of a creditor here But even if that case cannot be supported in its full extent, still the plaintiff's right of action was defeated by the discharge, because Plympton, the original party to the note, was a citizen of New York. The case falls within the decision of *Ogden* v. *Saunders*.

The note being made in New York, was made with reference to the laws of that State, and an indorsee therefore can have no greater rights than the original payee. *Mather* v. *Bush*, 16 Johns. R. 251; *Andrews* v. *Herriot*, 4 Cowen, 196 514, note. The note which was given in New York, did not

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discharge the original contract. Was not, then, the original consideration of the note discharged under the insolvent law? And if so, was not the note itself discharged? In England, a discharge under a foreign bankrupt law defeats the rights of a creditor there. *Potter* v. *Brown*, 5 East, 124. The same comity ought to be shown in this State to the laws of a sister State, which in England is shown to the laws of a foreign country.

PARKER C. J. delivered the opinion of the Court. The questions which arise out of the subject of State insolvent laws, and the effect of discharges under them, have been so long unsettled in this Commonwealth, owing to the unsatisfactory character of the decisions of the Supreme Court of the United States, which ought to govern cases of this nature, that we have waited with anxiety for a revision of all the cases by that high court, and a final adjudication upon a subject so universally interesting, and hitherto involved in so much perplexity. The case of *Ogden* v. *Saunders*, seemed, in its progress, to promise such a result, but unhappily, on some of the points which the case presented, the law is left as uncertain as it was before. *June 27th*

One thing however we understand to have been clearly decided by a majority of the justices of that court, and virtually by all, (as those who admit no validity at all to such laws, may be considered as uniting with those who give them only a limited operation,) which is, that discharges under such laws have no effect without or beyond the territory of the State where they are obtained, or against a party not a citizen of that State, or where the suit shall be brought in a court of the United States or of any State other than that in which the proceedings took place, notwithstanding the contract on which the discharge was intended to operate, was entered into and was to be performed in the State in which the discharge was granted.

Now this law, thus settled, is binding upon this Court, as well on account of the nature of the question, which is peculiarly proper for the decision of the highest court of the nation, as because the case itself, unless restrained by the smallness of the sum in controversy, may be carried to that court by writ of error, and our judgment be reversed; it being a ques- 197

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tion, of which, by § 25 of the judiciary act of the United States (of September 24, 1789), that court has jurisdiction.

But even if we were not inclined to repose on the decision in *Ogden* v. *Saunders*, but considered ourselves at liberty to resort to general principles, we are disposed to think that the defence set up under the certificate in this case could not prevail. It does not come within the case of *Blanchard* v. *Russell*, in which the contract was made in New York, by a citizen of that State, and was to be performed there, it not being transferable in its nature, being matter of account. A negotiable instrument made in New York, and indorsed for a valuable consideration to a citizen of Massachusetts before an application for the benefit of the insolvent law, ought not to be discharged under the process provided by that law. It is a debt payable anywhere, by the very nature of the contract, and it is a promise to whosoever shall be the holder of the note. At the time of the defendant's application for a discharge, his creditor upon this note was a Massachusetts man, and according to the case of *Baker* v. *Wheaton*, 5 Mass. R. 509, the certificate would be no bar to the action. The principle of this case was fully recognised and adopted in the case of *Watson* v. *Bourne*, 10 Mass. R. 337. Nor is there any thing in the case of *Blanchard* v. *Russell* to controvert these decisions, whatever may have been said *arguendo* by the judge who delivered the opinion. The contract in that case was in its nature to be performed in New York, and so was to be governed entirely by the laws of that State. The case before us is that of a negotiable promissory note, given in the first place by a citizen of New York to a person resident there, by whom it was immediately indorsed to a citizen of Massachusetts. The promisor became, immediately upon the indorsement, the debtor to the indorsee, who was not amenable to the laws of New York, where the application was made for relief under the insolvent law.

Defendant defaulted.[1]

[1] See *Agnew* v. *Platt*, 15 Pick. 417, *Betts* v. *Bagley*, 12 Pick. 572; *Glenn* v. *Humphreys*, 4 Wash. Circ. C. R. 424; *Hobblethwaite* v. *Batters*, 1 Miles, 82; *White* v. *Canfield*, 7 Johns. R. 117; *Peck* v. *Hozier*, 14 Johns. R. 346.

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GEORGE NAYLOR *et al. versus* JAMES DENNIE.

An officer went on board a ship with a writ, in order to attach goods as the property of a consignee, and the goods being in the lower hold covered up with other goods, he did not go below or see the goods, but paid the freight to the master, and left a keeper to take charge of the goods, as attached, and returned on the writ, that he had attached them at the time when he went on board. The keeper continued on board several days and took possession of the goods when they were hoisted from the hold. It *seems*, that in point of form the proceedings of the officer and his keeper constituted a valid attachment of the goods.

Goods shipped on board a vessel, are still *in transitu* after the arrival of the vessel in which they are shipped, until they are taken possession of on behalf of the consignee.

An attachment of goods on board a vessel, as the property of the consignee, does not defeat the right of the consignor to stop them *in transitu*.

Though the right of stoppage *in transitu* on the part of the consignor is adverse to that of the consignee, yet the consignor's right of stoppage is not defeated by his obtaining from the consignee a writing, in which the consignee declares that he revokes the order for the consignment, declines to receive the goods, and requests the master of the ship, or any other person having the goods in his custody, to deliver them to the consignor.

THIS was an action of replevin for eight cases of steel and a cask of hardware. The case was tried before *Wilde* J. and was submitted to the Court on a report of the evidence.

The plaintiffs were merchants and manufacturers, of Sheffield in England, and original owners of the goods in question. The goods were ordered by John K. Pickering of Portsmouth, New Hampshire; and the invoice was dated February 16th, 1828. They were to be paid for in four months from the date of the invoice; and were shipped on board the Corvo, at Liverpool, for Boston, by the shipping agents of the plaintiffs, for account and risk of Pickering and consigned to him. The Corvo arrived at Boston, April 26, 1828, and was entered at the customhouse, April 28, 1828, on which day Pickering failed.

On April 29th, Elijah Vose commenced a suit against Pickering, and delivered the writ to this defendant, directing him to attach Pickering's property on board the Corvo. The defendant made the following return on this writ. "Suffolk ss. Boston, April 29, 1828. At ten o'clock A. M. by virtue of this writ I attached, &c. [certain goods are described by marks and numbers] the same having been shown to me as

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the property of the within-named defendant, and then laden on board the ship Corvo of Boston, and the said merchandise was afterwards, on the third day of May, replevied and taken out of my hands and possession on a writ in favor of George Naylor," &c.

The facts relating to this attachment, if any thing contrary to the officer's return can be set up in this action, which is disputed by the defendant, are these.

At the time the writ was delivered to the defendant, Vose gave him a description of the marks and numbers of Pickering's goods, with directions to attach them, and at ten o'clock A. M. April 29th, before the Corvo had begun to discharge, the defendant went on board, with a keeper, but did not go below, or see the goods. The defendant then paid the freight of the goods to the master of the Corvo; and deputed his keeper to keep possession of them. The goods being stowed in the lower hold, and covered with goods of other shippers, could not be conveniently come at until the 1st or 2d of May, when the cask of hardware was hoisted on deck, but the other packages not being in sight, the cask, in the evening, was by order of the keeper and the customhouse officer on board, stowed between decks, where it remained until May 3d, when all the goods in controversy were taken from the vessel by direction of the keeper, who had continued on board the whole time, and placed in the customhouse store, and the customhouse storekeeper was substituted by Dennie as keeper of the goods, and he continued in custody of the same until they were replevied by the plaintiffs.

On April 29, William B. Lang, the plaintiffs' agent at Boston, went to Portsmouth, and on the 30th of April procured from Pickering a writing, signed by Pickering, which stated that he had ordered goods of Naylor & Sanderson, part of which had arrived at Boston, of which the bill of lading and invoice were accidentally mislaid, and that other goods were expected to arrive, and that by reason of misfortune in business he was unable to receive and pay for the goods; and concluded, "Now, therefore, I hereby revoke and countermand the orders I gave for said goods, and decline to receive the same or any part thereof, and I hereby request the master

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of any vessel or other person who may have said goods, or any part of them in their custody, to deliver the same to William Bailey Lang or his order, the agent in this country for the aforesaid houses." When Pickering delivered this writing to Lang, it was with an understanding that he was absolved from all liability for the goods. Neither Pickering nor Lang knew of the attachment at this time. At nine o'clock on the morning of May 1st, Lang went on board the Corvo, and exhibited to the master the paper signed by Pickering, and demanded possession of the goods, offering to pay the freight. He was at this time informed that the goods had not been come at. He went again on board about ten o'clock the same morning, and then went below and searched for the goods, but could not find them, and repeated his demand for them. He testified that he kept watch of the vessel from time to time, in order to ascertain when the goods were come at, and from this time till they were replevied, he attended to but little else, being always ready and desirous of doing every thing on behalf of the plaintiffs to obtain possession of the goods. On the afternoon of May 1st, Lang, being on board the Corvo, saw the cask of hardware, and pointed it out to the master, and told him not to deliver it to any one but himself. On the 3d of May, Lang obtained possession of the goods by the writ of replevin.

The steel, which was a part of the goods attached, was sold by Lang to the Newmarket Manufacturing Company, under the following circumstances. Pickering had agreed with the agent of the company to import two tons of steel of assorted sizes, and sell it to them at 18 cents a pound, on a credit of four or six months. Pickering, in consequence, ordered the steel in controversy, being however double the quantity contracted for by the company. Lang testified that he made no bargain with Pickering respecting the goods, when he obtained from him the relinquishment of the consignment, but thinks it likely that Pickering told him that the steel was originally ordered for the company. Lang told Pickering that he should be glad to dispose of it at cost and charges, and on the 3d of May wrote to Pickering a letter, in which, after mentioning the attachment, and that he had obtained possession of the goods,

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he says, "As I promised, I will let you have, for approved paper, the lot of steel at cost and charges, time four months from 16th of February last; or if two months' more credit is wanted, it may be had by adding interest. I should like to have your early reply, so I may avoid losing other offers, if you do not accept." This letter was handed by Pickering to the agent of the Newmarket Manufacturing Company; and the company accordingly purchased the steel on the terms proposed in the letter. The steel, at cost and charges, came to about 16 cents a pound; and Pickering has claimed from the company the difference between that sum and 18 cents, the price for which he had contracted to furnish it, as being the profit justly belonging to him.

Judgment was to be given by the Court, according to their opinion on the foregoing facts.

March 26th. *J. Pickering* and *Cooke*, for the plaintiffs. The attachment supposed to have been made by the defendant on April 29th, was a nullity, because he did not then take possession of or even see the goods *Lane* v. *Jackson*, 5 Mass. R. 163; *Bond* v. *Padelford*, 12 Mass. R. 394; *Phillips* v. *Bridge*, 11 Mass. R. 242; *Lyman* v. *Lyman*, 11 Mass. R. 317; *Knap* v. *Sprague*, 9 Mass. R. 258; *Vinton* v. *Bradford*, 13 Mass. R. 114; *Denny* v. *Warren*, 16 Mass. R. 420; *Bagley* v. *White*, 4 Pick. 395. Besides, it is doubtful whether an attachment can be made of goods on board a vessel, before they are entered at the customhouse. *Dennie* v. *Harris*, 5 Pick. 120.* As this action is brought by a stranger to the suit, the return of the officer is not conclusive, but may be contradicted.

But if the attachment was good in point of form, still it is inoperative, as Pickering had rescinded the contract before the goods came into his possession. *Scholfield* v. *Bell*, 14 Mass. R. 40. The failure of Pickering gave the consignors a right to stop the goods *in transitu*; and the notice which was given by Lang to the master, of this claim of the consignors, was sufficient, without his actually taking possession of the goods

* The judgment in this case was reversed by the Supreme Court of the United States, at January term 1830.

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at the time. And the right of the plaintiffs to stop *in transitu*, could not be defeated by an intervening attachment. *Smith* v. *Goss*, 1 Campb. 282; *Feise* v. *Wray*, 3 East, 93; *Northey* v. *Field*, 2 Esp. R. 613; *Litt* v. *Cowley*, 7 Taunt. 169; *Purker* v. *M'Iver*, 1 Desauss. 274.

S. Hubbard and *W. Austin*, for the defendant. The return of the officer is conclusive, as to the fact of the attachment, in this action; it is only in an action for a false return, that it can be contradicted. *Slayton* v. *Chester*, 4 Mass. R. 478; *Bott* v. *Burnell*, 9 Mass. R. 96; *Eastabrook* v. *Hapgood*, 10 Mass. R. 313; *Bean* v. *Parker*, 17 Mass. R. 591 [*Whitaker* v. *Sumner*, 7 Pick. 551.]

But the facts in the case show a valid attachment. The officer, by going on board the vessel, paying the freight to the master and thus removing his lien, and putting a keeper on board, obtained the possession and control of the goods. It was not necessary that he should see them. The lien of the United States for duties does not invalidate the attachment, for it is settled, that an attachment may be made of property subject to a lien. *Burlingame* v. *Bell*, 16 Mass. R. 318.

The right of stoppage *in transitu* depends upon the insolvency of the consignee. Abbott on Ship. 368. But Pickering was not insolvent on April 26th, when the Corvo arrived. The right of stoppage *in transitu* therefore could not arise. *Stubbs* v. *Lund*, 7 Mass. R. 453; *Ilsley* v. *Stubbs*, 9 Mass R. 65. Independently of the right of stopping *in transitu*, the plaintiffs can have no claim to these goods, for the property was completely vested in Pickering as soon as it was sent from Sheffield.

The stopping *in transitu*, by the consignor, must be adverse. *Siffken* v. *Wray*, 6 East, 371; *Lane* v *Jackson*, 5 Mass. R. 162. In the present case, Lang, the plaintiffs' agent, obtained the consent of Pickering, the consignee, to his taking possession of the goods. Taking the goods by virtue of this bargain, was not stopping them *in transitu*; for which Pickering's consent was not necessary. The bargain which Lang made with Pickering respecting the sale of the steel to the Newmarket company, on which Pickering claimed a commission, shows a control of the property by Pickering, and pre

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vents the proceedings of Lang from amounting to a stoppage *in transitu*.

Pickering, in reply, said that the right of stopping *in transitu* would be nugatory, if it ceased the very instant the vessel arrived and it was necessary for the consignor to go to sea in order to exercise it. The claim made by Lang was seasonable, being made before the goods were entered or taken out of the vessel. *Coates* v. *Railton*, 6 Barn. & Cressw. 423; 2 Kent's Com. 430; *Mills* v. *Ball*, 2 Bos. & Pul. 457; Abbott on Ship. 373, 375.

June 27th. PARKER C. J. delivered the opinion of the Court. The question presented by this report is, whether the plaintiffs have the property in the goods taken by the defendant under the writ of attachment in virtue of which he acted; and this depends upon their right to rescind the contract of sale, under which the goods were shipped by their agent in Liverpool. All the facts appear in this case, which by the law merchant are necessary to constitute the right of the vendor to take the goods, before they come into the possession of the vendee. The goods were shipped by the plaintiffs in England to Pickering, a merchant in Portsmouth, on an order sent out by him; they were shipped on his account and risk, upon a credit of four months; they arrived in the port of Boston, but before they were delivered to the consignee, or were unladen from the vessel, they were demanded by an agent of the plaintiffs, who had procured a relinquishment of the consignment, the consignee having become insolvent. There can be no doubt that the goods were then *in transitu*; for notwithstanding the arrival of the vessel, they had not been discharged from the ship, nor had they been taken possession of by any one for the consignee.[1]

What then are the objections to the plaintiffs' right to recover? The owner or master of the ship had no right to retain the goods; for the freight, on account of which alone they had a lien, had been offered to be paid.

But it is said, that before any claim was made for the goods

[1] See Long on Sales, (Rand's ed.) 308 *et seq.*; Chitty on Contr. (4th Am ed.) 342 *et seq*

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by the agent of the plaintiffs, they were attached by the defendant as the property of Pickering; and the return of the officer is said to be conclusive of this fact. The fact of an attachment is disputed, because by the parol evidence it appears, that there was no actual seizure of the goods by the officer, before the claim of the plaintiffs was made known to the master of the ship. On the other hand it is said, that the officer's return is conclusive of the attachment; and even if it is not conclusive, the officer having made a demand of the goods, tendered the freight, placed a keeper in the vessel with orders to take possession of the goods as they should come out of the hold, and afterwards having obtained actual possession, the attachment was complete. We are inclined to this opinion, but we do not think the point material.[1] For if the plaintiffs had the right of stopping and reclaiming the goods, and duly exercised the right, the intervening attachment could not defeat it. This right is founded upon an implied condition in the sale, that if the vendee should become actually insolvent, between the shipment of the goods and the reception of them by the vendee, the vendor shall have the right to rescind the contract and reclaim the goods. To allow an attachment before the transit is at an end, to have effect, will be to defeat a useful and necessary provision of the law merchant.[2]

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But it is thought, that the transactions between the agent of the plaintiffs and the consignee show that the right of stopping *in transitu* did not exist, or that it was not so exercised as to vest the property in the plaintiffs; because it is alleged, that the right is adverse to that of the consignee, and must be exercised adversely; whereas the act of the agent was with the consent and in virtue of an agreement with the consignee, as is proved by the writings and papers referred to. The case of *Siffken* v. *Wray*, 6 East, 371, has been cited in support of this doctrine. There are other cases of the same character; all of which show, that when the vendor claims title under the vendee, as by indorsement of the bill of lading

[1] But see *Harris* v. *Dennie*, 3 Peters, 292; *Dennie* v. *Harris*, 9 Pick. 364.

[2] Long on Sales, (Rand's ed.) 330.

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or by any other act of transfer, he does not rely upon his own right of stopping *in transitu*; but on the contrary, he affirms and establishes the sale in a manner inconsistent with that right. We suppose this doctrine is correct; indeed it has been adopted by this Court in the case of *Lane* v. *Jackson*, cited in the argument. But we understand this doctrine to

205 mean no more, than that the right of stopping *in transitu* cannot be exercised under a title derived from the consignee; not that it shall be exercised *in hostility* to him; for we find it laid down in the same case of *Lane* v. *Jackson*, and in *Feise* v. *Wray*, 3 East, 93, that the consignment may be refused, and that, even by the direction of the consignee, some stranger may be appointed to take possession of the goods for the consignor, though he may be absent, and if he consents afterward, the rescinding of the sale is complete.[1]

This explanation of the doctrine is recognised in *Scholfield* v. *Bell*, 14 Mass. R. 40, in which case, even the indorsement of the bill of lading by the consignee was held not to affect the right of stopping *in transitu*, it appearing that the act was done with a view to facilitate the rescission of the contract.[2]

In this case, the consignee has done nothing more than relinquish his consignment, and the plaintiffs depend upon their original property, and not upon any transfer or conveyance from the vendee.

It is objected also to the exercise of this right by the plaintiffs, that the consignee did not become insolvent until after the arrival of the goods; by which is supposed to be meant, that his insolvency was not known or declared. But we do not see how this can affect the question. We do not find, that the right of stopping depends upon a declared insolvency or open bankruptcy before the arrival of the goods. It is enough that the affairs of the consignee are so involved, that

[1] The stoppage of goods *in transitu* does not rescind the contract of sale, but places the parties in the same situation, as nearly as may be, in which they would have been, if the vendor had not parted with the possession. *Newhall* v. *Vargas*, 15 Maine R. (3 Shepley,) 314; Long on Sales, (Rand's ed.) 337, and see cases cited in note 3; *Hodgson* v. *Loy*, 7 T. R. 440; *Tucker* v. *Humphreys*, 4 Bingh. 516; *Bloxam* v. *Saunders*, 4 Barn. & Cresw. 941.

[2] See Chitty on Contr. (4th Am. ed.) 345; *Walter* v. *Ross*, 2 Wash. Circ C. R. 294; *Hollingsworth* v. *Napier*, 3 Caines's R. 182.

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ne is unable to pay for the goods, if he was to pay on delivery; or that he has become actually insolvent before he shall have taken possession.

The insolvency of this consignee was public before the goods came to his possession, and before the plaintiffs claimed them; which is enough to establish their right.[a]

HENRY GARDNER *versus* FREDERIC TUDOR. 206

The defendant in an action upon a promissory note said "he supposed that the note was paid by the land mortgaged as collateral, that he was willing to do what was right, that he should be willing to make some small additional payment, for the purpose of settling the business, but if the plaintiff thought proper to sue, without taking the land, he should resist the suit." *Held*, that this did not take the demand out of the statute of limitations, although it was proved, that the value of the land was much less than the amount due on the note.

ASSUMPSIT on a promissory note, dated August 31, 1813, for 1100 dollars, signed by the defendant, payable to one Kettell, or his order, and by him indorsed to the plaintiff.

The defendant pleaded the general issue, which was joined; also *non assumpsit infra sex annos*, and *actio non accrevit infra sex annos*; to which the plaintiff replied a new promise within six years, and that the action did accrue within six years; and issues were joined on these replications.

At the trial, before *Wilde* J., the plaintiff produced a mortgage deed, of the same date with the note, from a sister of the defendant, to Kettell, conveying certain land to secure the payment of the note; and an assignment of the mortgage to the plaintiff, dated January 12, 1814. The mortgage was foreclosed by the plaintiff on September 1, 1818. The mortgager conveyed her interest in the land to the defendant, by deed dated November 11, 1813.

To take the case out of the statute of limitations, the plaintiff produced one Lewis as a witness, who testified that he presented the note to the defendant for payment on Decem-

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[a] See Long on Sales (Rand's ed.) 307 *et seq.*; Chitty on Contr. (4th Am. ed.) 341, 342; *Newhall* v. *Vargas*, 15 Maine R. (3 Shepley,) 319.

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ber 8, 1826. The defendant observed, that he supposed the note had been paid by the land mortgaged as collateral security. The witness answered, that he had understood the land was considered of less value than the note, and that possession had not been taken, and for that reason payment was required upon the note. The defendant replied, that he believed that the law (which he considered to be unjust) required the promisor of a note to make good the deficiency, if the land mortgaged proved to be of less value than the amount of the note; that the witness might say to the plaintiff, that he (Tudor) wished the business settled, and was willing to do
207 what was right; that he considered that the land was given in payment of the note, as he was then a bankrupt; but that he should be willing to make some small additional payment, for the purpose of settling the business without having recourse to law; but if the plaintiff thought proper to sue, without taking the land, he should resist the suit; and if possession had not been taken of the land, he considered it a damage to the plaintiff and himself. At a subsequent interview, the defendant told the witness, that he could not make any propositions to the plaintiff for settling the demand, but should be glad to have a proposition from him.

The jury were instructed to find a verdict for the plaintiff upon the several issues, and, in assessing damages, to deduct the value of the land at the time of the foreclosure; and a verdict was returned for the plaintiff for 1834 dollars 93 cents, subject to the opinion of the Court upon the facts above stated.

March 28th. ***Shaw*** and ***Adan***, for the plaintiff. An acknowledgment of indebtedness is sufficient to take the demand out of the statute of limitations. 1 Stark. on Ev. 891, 892, 895, and the cases there cited; ***Frost*** v. ***Bengough***, 1 Bingh. 266; ***Johnson*** v. ***Beardslee***, 15 Johns. R. 4; ***Buswell*** v. ***Roby***, 3 New Hamp R. 467; ***Halliday*** v. ***Ward***, 3 Campb. 32; ***Mountstephen*** v. ***Brooke***, 3 Barn. & Ald. 141; ***Whitney*** v. ***Bigelow***, 4 Pick. 110. The remark of the defendant, that he supposed the note had been paid by the land mortgaged as collateral security, is immaterial if used in his defence. ***Leaper*** v. ***Tatton***, 16 East, 419; ***Douthwaite*** v. ***Tibbut***, 5 Maule & Selw. 75,

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Colledge v. *Horn*, 3 Bingh. 119; *Dean* v. *Pitts*, 10 Johns. R. 35. But it was proved at the trial that there was no ground for the supposition, and thus the case is brought within the rule laid down by *Gibbs* C. J. in *Hellings* v *Shaw*, 7 Taunt. 608, that where the defendant has said that the debt has been discharged by a particular means, to which he refers with precision, so that the court can say that it has not been discharged in any other mode, if the plaintiff disproves that mode, he will recover, by striking from under the defendant the only ground on which he relies. *Partington* v. *Butcher*, 6 Esp. R. 66; *Beale* v. *Nind*, 4 Barn. & Ald. 568; 2 Stark. on Evid. 893, 894, and cases there cited; *Bangs* v. *Hall*, 208
2 Pick. 368. When the witness observed, that the land was of less value than the note, the defendant instantly stated the liability of every mortgager in such a case, and added, "I am willing to do what is right and wish this business to be settled;" the defendant's own inference from the premises he had laid down, was, that he was a mortgager, and that every mortgager was liable for the difference between the amount of the debt and the value of the land. This was an acknowledgment of indebtedness and a promise to pay. He again expressly stated his legal liability for that difference, in the last remark in the first conversation. Saying that he was willing to do what was right and wished the business settled, is alone sufficient to take the case out of the statute. *Frost* v. *Bengough*, 1 Bingh. 266; *Clark* v. *Hougham*, 2 Barn. & Cressw. 149; *Gibbons* v. *M'Casland*, 1 Barn. & Ald. 690; *Galway* v. *Barrymore*, 1 Dickens, 163; *Halliday* v. *Ward*, 3 Campb. 32; *Colledge* v. *Horn*, 3 Bingh. 119. The remark, that if the plaintiff thought proper to sue, without taking the land, the defendant would resist the suit, is a conditional promise, that he would not contest the claim, if the plaintiff would allow the value of the land. This brings the case within the letter of the law as ruled in *Whitney* v. *Bigelow*, and *Bangs* v. *Hall*. The defendant's observation, that he could not make any propositions to the plaintiff for settling this demand, but should be happy to have a proposition from him, was an admission that the defendant was under an existing liability to the plaintiff.

Nichols, for the defendant, cited *Stanton* v. *Stanton*, 2 New

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Hamp. R. 426; *Perley* v. *Little*, 3 Greenl. 97; *Sands* v *Gelston*, 15 Johns. R. 511; *Tanner* v. *Smart*, 6 Barn. & Cressw. 603; *Porter* v. *Hill*, 4 Greenl. 41; *Marshall* v. *Dal liber*, 5 Connect. R. 480; *Bailey* v. *Bailey*, 14 Serg. & Rawle, 195; *Bangs* v. *Hall*, *ubi sup.*; *Clementson* v. *Williams*, 8 Cranch, 72; *Wetzell* v *Bussard*, 11 Wheat. 310; *Bell* v. *Morrison*, 1 Peters's Sup. Ct. Rep. 351; *Miller* v. *Caldwell*, 3 Dowl. & Ryl. 267; *Bickwell* v. *Keppel*, 4 Bos. & Pul. 20; *Lawrence* v. *Hopkins*, 13 Johns. R. 288; *Danforth* v. *Culver*, 11 Johns. R. 146; *A'Court* v. *Cross*, 3 Bingh. 329.

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June 27th.

Putnam J. delivered the opinion of the Court. The general question is, whether the evidence is sufficient to prove a promise to pay, within six years.

In the absence of an express promise, it is necessary that the plaintiff should prove that the defendant has made an unqualified acknowledgment of the debt within six years, or that he has made a promise to pay upon a condition which has been performed. The law would raise a promise in the first case; and the performance of the condition, in the second case, would have the effect of an express promise. The authorities and principles relating to this subject were examined with some care in the case of *Bangs* v. *Hall*, 2 Pick. 368. Our attention has been repeatedly called to this subject since that decision, and upon a further examination of the cases cited at bar, we do not perceive any reason to vary from it.[1]

We proceed directly to the question, and apply the facts in the case at bar to the recognised doctrine of the case of *Bangs* v. *Hall*.

When the note was presented by the witness to the defendant, his first remark was, that "he supposed the note had been paid by the land mortgaged as collateral." The witness then stated the rule of law which subjects the debtor to pay the balance of the debt, after deducting the value of the property mortgaged. The defendant's answer implied that he was aware of that law, but he thought it was unjust. He considers that it would be unjust to enforce that rule of law against

[1] See *Bailey* v. *Crane*, 21 Pick. 324; *Sigourney* v. *Drury*, 14 Pick. 390.

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him We must in this part of the case recollect, that the defendant then had a perfect protection against the plaintiff's claim, and an undoubted right to prescribe his own terms and rules, which are not to be enlarged or varied by the Court. The defendant proceeds to say, that he considered the land to have been given in payment of the note; assigning as a reason, that he was then a bankrupt. This land was conveyed by the deed of his sister Whether it was a volunteering conveyance, or for consideration paid to her by the defendant, does not appear, and perhaps is not material. The defendant believed it was "given in payment." He proceeds to say, however, that he should be willing to do what was right, and immediately explains his own idea of what was right. "He should be willing to make some small additional payment to the 210
land, for the purpose of having the business settled without having recourse to law." Now the plaintiff is not content with that, but would have the Court infer, that the defendant, by that qualified declaration, was willing to pay the whole balance. It seems to us that such construction would greatly extend his meaning. He speaks of making only some small additional payment; and that proposal was made, not on the ground of its being a just claim or debt, but for the purpose of avoiding litigation. He contemplated a small sum, which perhaps might be less than the expense of his defence. The plaintiff would infer from it, a promise to pay the whole, which would draw after it the expense of the suit. But the defendant seems to exclude this conclusion by his next remark, "that if the plaintiff thought proper to sue without taking the land, he should resist the suit." We understand the defendant to mean, that unless the plaintiff would take the land in payment, as he understood it was originally conveyed, he would resist the suit. We are not now to consider whether the defendant has conducted himself with propriety and liberality towards the plaintiff or not. He had the right of judging upon that subject. It was for him to determine, whether he would waive the provision of the statute or not. And upon a careful review of the whole matter, we are all satisfied that he has not precluded himself from its protection. There is no unqualified acknowledgment of an existing debt, from

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which the law will raise a promise to pay; nor any promise to pay upon a condition which has been performed. The proposal was not (as the plaintiff contends) to pay the balance of the note if the plaintiff would allow the value of the land, but to pay some small sum in addition to the value of the land, to prevent a lawsuit. That proposal was not accepted by the plaintiff; but instead of that, he seeks to recover at law, and the defendant, according to his declaration, may stand upon his legal rights, in the same manner as if that proposal had not been made.

The judgment of the Court must therefore be, that the verdict, which was taken for the plaintiff, be amended and entered up as a verdict for the defendant, upon the issues touching the statute of limitations.[1]

[1] See *Morrell* v. *Frith*, 8 Carr. & Payne, 246; *Dodson* v. *Mackey*, 4 Nev & Man 327; *Linsell* v. *Bonsor*, 2 Bingh. New Cas 241; *Dubbs* v. *Humphries*, 10 *Bingh.* 446; *Gibson* v. *Bagshott*, 5 Carr, & Payne, 209, note; *Exeter Bank* v. *Sullivan*, 6 N. Hamp. R. 124; *Russell* v. *Copp*, 5 N. Hamp. R 154; *Bangs* v *Hall*, 2 Pick. (2d. edit.) 377, 378, 379, notes and cases, cited *Sigourney* v. *Drury*, 14 Pick. 390, 391; *Bailey* v. *Crane*, 21 Pick. 323; *Thayer* v *Mills*, 14 Maine R. (2 Shepley,) 300; *Lombard* v. *Pease*, id. 349; *Brackett* v *Mountfort*, 3 Fairfield, 72; Revised Stat. *c.* 120, § 13; *Gallagher* v *Milligan*, 3 Pennsylv. R. 177; *Church* v. *Fetcrow*, 2 Pennsylv. R. 301; *Oakes* v. *Mitchell*, 15 Maine R. (3 Shepley,) 360.

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ROBERT KEITH *et al. versus* ANN WOOMBELL *et al.*

An ante-nuptial contract by which the wife is to hold her own earnings to her separate use, is fraudulent as it respects previous or subsequent creditors of the husband.

Whether a settlement upon a wife after marriage, without any previous contract or consideration, by a person free from debt, is valid against creditors, *quære;* but at any rate the intention to make such a settlement must be clearly proved.

Husband and wife give their joint promissory notes and take from the promisee a bond, that if they, or either of them, pay all taxes on certain land, he will, upon payment of the notes, convey the land, at the request of the wife, to her or her appointee. The husband is an ignorant man, and incapable, by reason of alienage, of holding real estate. *Held*, that an intention to make a settlement on the wife was not clearly proved; and she was decreed to deliver the bond over to the husband's assignee.

Pending a bill in equity to obtain possession of a bond admitted by the defendant to be under her control, on motion it was ordered, that she should leave it with the clerk of the court, with liberty to the plaintiff to take a copy.

The constitutional provision, that a subject shall not be compelled to furnish evidence against himself, has reference to criminal cases only.

BILL in equity. The case was argued by *D. A. Simmons*, for the plaintiffs, and *Aylwin*, for the defendant Ann Woombell.

PARKER C. J. delivered the opinion of the Court. This *June 27th*
is a bill in equity to obtain possession of a bond given by Abraham Babcock to Joseph Woombell and Ann his wife, with a condition to convey to Ann, or to such person as she shall appoint, a certain parcel of land in Boston, on payment of the sum of 1385 dollars to Babcock, his executors and administrators. The bill states, that Joseph being an alien, the bond was taken in this form to avoid the consequences of his alienage in regard to real estate, that the bargain was made for and by him, and that so much of the consideration as has been paid, being about 900 dollars, has been paid by him or out of his funds. The plaintiffs then state, that Joseph, being indebted to them in the sum of 730 dollars, assigned to them the bond as security for that debt, and they pray that the bond may be delivered up to them, in order that they may be enabled to procure a conveyance to them of the estate, by means whereof they may obtain satisfaction of the debt.

Ann Woombell, in her answer, denies the principal facts stated in the bill, and says that she was married to Joseph in January, 1814; that before her marriage with him she had, in

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her own right, certain household furniture, and money to the amount of 350 dollars; that Joseph was worth nothing, and that by a marriage treaty between them, she was to hold to her own use all the property she was then possessed of, as well as all she might earn by her own industry after the marriage, and that she had before the making of the bond acquired additional property by her own earnings; that being desirous to invest what she had thus acquired, in the best and safest manner, she was advised to purchase real estate, and that accordingly, in 1824, she made the bargain with Babcock which resulted in the bond; that she paid down 384 dollars as part of the price, and that the residue was to be paid in five annual instalments, which she hoped to be able to pay from her own earnings and from the earnings of a son and daughter by a former marriage; that Babcock promised to make the contract in such form as would best secure the property for her sole use, and that by his advice the bond in question was prepared and the name of Joseph Woombell inserted by his recommendation, and that Joseph took no part in the transaction and had nothing to do therewith; that Joseph executed, with her, five promissory notes for the consideration unpaid, and that the bond was delivered by Babcock to her, and that it remained in her possession until delivered to her counsel, and she denies that it was ever in possession of Joseph; that she has been enabled by her own exertions and those of her children, to lay up enough to pay two of the notes and part of another, with the interest, except that Joseph had voluntarily paid a small portion of the same; that she had filed a libel for divorce against Joseph for the crime of adultery committed by him before the execution of the assignment, which was known to the complainants at the time, so that the taking of the assignment was in fraud of her rights. She then denies the power and right of Joseph to assign the bond to her prejudice. And in her answer to the amended bill, she further states, that a decree of divorce has been passed, so that the marriage bonds between her and Joseph are dissolved, and that at the time of making the bond by Babcock, Joseph was free of debt, and that he consented to the contract in pursuance of the ante-nuptial contract, and that he signed the promissory notes in evidence of his consent

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She also states that Keith, one of the complainants, applied to her after the filing of her bill for divorce, to agree to mortgage the premises for the security of the debt due to the complainants, if he should procure an assignment of the bond; which she refused, stating that it was her property. And she denies that any agreement was made for an assignment, before filing the libel, or that she knew of any such.

An important fact asserted in this answer and denied in the amended bill, is, the existence of an ante-nuptial contract, whereby she was to retain what personal property she may have been possessed of, and the fruits of her labor and industry, to her own separate use, contrary to the marital rights of Joseph, to whom by law all such property would appertain instantly upon the marriage. Such contract in relation to property actually belonging to her would not be extraordinary; but in regard to the fruits of her industry after marriage, the evidence of such a contract should be very imposing, to establish the fact. That two very poor people, depending upon their labor for their living, should upon a contemplated marriage enter into an agreement, the effect of which would be, that the labor of one should go to the support of both, and that the labor of the other should be to the profit of that one only, would be a very unequal bargain, and hardly sustainable in a court of equity. It would be without consideration, and as it respects *future* creditors even, would be fraudulent, for the visible means of the husband in such case, upon which he would gain his daily credit, would be continually diminished by a secret, invisible consumption, which would keep him down and render him wholly unable to pay his debts. The books do not furnish such an ante-nuptial contract as this, nor does the evidence satisfactorily make it out. The ante-nuptial contract is wholly without proof, but rests on the unsupported answer of the respondent. Even her own children, by whose testimony another fact is attempted to be proved, deny all knowledge of such a contract; and she herself states, that it consisted merely in words which passed between her and her husband just before the marriage. It is supposed, however, that the bond itself and other evidence in the case, prove a settlement by her husband upon her, for the consideration of love and affection;

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and also, that all the money paid on the contract was her own, equitably at least, it consisting of savings by herself before the marriage, and of her own earnings afterward, upon an understanding that they were for her separate use.

We do not think it proved that she had any money on hand at the time of her marriage. The only evidence of it, beyond her own declaration, is the testimony of her two children, one of the age of eight and the other of six years at the time about which they testify, and their testimony taken fourteen or fifteen years after the fact. And even if these witnesses were credible, their testimony is too loose to be relied on. They may be believed when they say their mother had money, but when they undertake to judge from the heap only, that there were 300 or 400 dollars, the multiplying faculties of such children aided by recollection at so distant a period, can hardly gain confidence. Nor do we see reason to believe that she was in the way of earning to herself nearly 400 dollars, which have been paid on the contract, in addition to 360 paid at the time of its execution. On the contrary, taking the testimony altogether, we see more reason to believe that all the money has been paid from the proper funds of the husband. He was an industrious man, always employed either in fishing for lobsters, carrying about sand and water, as a watchman, keeping a fish-stall, having a pair of trucks, and one, two, and sometimes three horses. He must have earned a good deal, and all agree that what he did earn he gave to his wife to keep. She was a saving woman and probably accumulated a considerable sum; enough to make the payment. It may be that part of it was from what she called her own earnings; which were neverthe less her husband's property. So that if the design of Woom bell, in the transaction with Babcock, was to vest the property of the land in his wife, it was a mere voluntary settlement without consideration. But that this was his design was not sufficiently proved. Such a settlement, if made, is questionable as to its validity against even subsequent creditors.* In most of
215 the cases cited in which such settlements were supported, there was either an ante-nuptial contract leading to them, or a

* *D. A. Simmons*, for the plaintiffs, cited on this subject, *Ramsden* v. *Hylton*, 2 Ves. sen. 308; *Beaumont* v. *Thorpe*, Belt's Supplem. to Ves. sen 25

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consideration by the relinquishment of some right or property of the wife: though we do not now determine, that a voluntary settlement, without a previous contract or a consideration, upon a wife or children, by a person free from debt, cannot stand.

The result of Chancellor *Kent's* inquiries on this subject, is, that post-nuptial settlements may be good, if made upon a valuable consideration; a fair and reasonable consideration; such as the wife's relinquishing her own estate, or charging it with the husband's debts. But the amount of the consideration must be such as to bear a reasonable proportion to the value of the thing settled, and when valid, such settlement will be sustained against existing creditors and subsequent purchasers. But he says, "a settlement upon a meritorious consideration, or one not strictly valuable, but founded on some moral consideration, as gratitude, benevolence or charity, would be good against the settler and his heirs; but whether it would be good against creditors and purchasers, does not seem to be entirely settled, though the weight of opinion, and the policy of the law, would rather seem to be against their validity in such a case." 2 Kent's Com. 146. And Atherley, whose treatise on this subject is considered able, is of opinion that such settlement cannot stand against even subsequent creditors. At any rate it ought to be clear that such settlement was intended, and not left to conjecture, as in this supposed settlement. How is this proved? It is thought, by the bond itself. In the penal part the obligor acknowledges himself indebted to Joseph and Ann Woombell. The condition recites, that the obligor had agreed to sell to them jointly;

Reade v. *Livingstone*, 3 Johns. Ch. R. 488; *Taylor* v. *Jones*, 2 Atk. 600; *Bayard* v. *Hoffman*, 4 Johns. Ch. R. 450; *Damon* v. *Bryant*, 2 Pick. 411; *Sterry* v. *Arden*, 1 Johns Ch. R. 261; Atherley on Marriage Settlements, 188; *Bean* v. *Smith*, 2 Mason, 252.

Aylwin, for the defendant, cited *Rich* v. *Cockell*, 9 Ves. 375; *Tyrrill* v. *Hope*, 2 Atk. 562; *Doe* v. *Routledge*, Cowp. 711; *Lister* v. *Lister*, 2 Vern 67; *Buck* v. *Andrew*, ibid. 120; *Campion* v. *Cotton*, 17 Ves. 264; *Washburn* v. *Sproat*, 16 Mass. R. 449; *Slanning* v. *Style*, 3 P. Wms. 336; *Sexton* v. *Wheaton*, 8 Wheat. 229. [See also *Wadsworth* v. *Havens*, 3 Wendell, 411; *Gilmore* v. *North Amer. Land Co.* 1 Peters's Circ. C. R. 460, 464; *Thompson* v. *Dougherty*, 12 Serg. & Rawle, 448; *Howe* v. *Ward*, 4 Greenleaf, 195; 1 Story's Comm. on Eq. 348.]

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that *they* had paid him 385 dollars, and had given their joint notes to him to the amount of 1000 dollars, in five divisions. The obligation is, if *they* or *either* of them pay all taxes, &c. that after payment of the notes, he will, at the request of Ann in writing, notwithstanding her coverture, convey to her, her heirs and assigns, or to such person as she shall appoint in writing, the land described in the bond.

Now it is argued, that this form of the contract shows manifestly, that J. Woombell's intention was to settle this property on his wife. There is quite as much to justify a contrary inference. Such an intention ought to have been clearly expressed, and there should be no circumstances existing to account for such a contract consistently with a want of such intention. Whereas the fact is admitted, that Woombell was an alien; so that there was a reason for not making the conveyance to him. Besides, he was an ignorant man, unacquainted with the forms of conveyance or obligation. His wife took, as she states, the whole control of the transaction. He was in the kitchen while the business was transacting in the parlour; was called in merely to sign the notes, whereby he bound himself to pay 1000 dollars in five years; to get an estate, not to himself, but to his wife, and her, not his, children. That a laboring man should thus give up all he had, and pledge all his earnings for five years to come, to make a settlement upon his wife *voluntarily* and with a knowledge of what he was about, is in the highest degree improbable. It is too unreasonable to be admitted, without stronger evidence than any which this case exhibits. It ought rather to be supposed, and we do suppose, that he intended his wife should be his agent in taking the bond and estate, on account of his inability as an alien, and his incapacity in other respects, and he ought not to be bound down by a contract thus obtained, to keep himself in utter poverty for the sake of building up an estate for his wife.

Upon these considerations we are of opinion, that the interest and property of the bond were, at the time of its execution, and continued to be, in Joseph Woombell, until it was assigned to the complainants, who now have the equitable interest therein;[1] and therefore there must be a decree, that it

[1] See *Commonwealth* v. *Manley*, 12 Pick. 176

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oe delivered over to the complainants, to be enforced for their use and benefit so far as may be required for the security and payment of the debt due to them from Joseph Woombell. And as the bonds of marriage between Joseph and Ann have been dissolved by a decree of divorce for adultery committed by him, upon application to this Court, or by agreement of Joseph, there may be a decree, that the value of the real estate, which, according to the bond, is to be conveyed to the assignees, over and above the amount of the debt due to them, shall be paid over to Ann to her sole use, or shall otherwise stand charged for her maintenance, according to such decree as may hereafter be obtained for her.

After the filing of the original bill and answer, the plaintiffs moved for an order that Ann Woombell should leave with the clerk of the court, the bond admitted by her to be under her control, with liberty to the plaintiff to inspect it and take a copy. This was opposed, on the ground, that by the constitution a subject is not to be compelled to "furnish evidence against himself." But the Court said that that had reference to criminal cases; and that the plaintiffs, claiming an interest in the bond as assignees, were entitled to see it. The motion was granted.

Elisha Parks, Petitioner, &c. *versus* The Mayor and Aldermen of the City of Boston. 218

The power vested in the mayor and aldermen of Boston as to laying out or altering streets, "whenever in their opinion the safety or convenience of the inhabitants shall require it," is *judicial*, and a certiorari lies to remove their proceedings in such a case.

Where such mayor and aldermen shall adjudge that the laying out or altering of a street is required by public safety and convenience, their having taken a bond from an individual to contribute towards the expense, will not vitiate their proceedings, provided the bond was not made the basis of their proceedings, and the adjudication was not colorably for the use of the city and really for the benefit of the individual.

Petition for a certiorari, to set aside certain proceedings of the mayor and aldermen of the city of Boston in relation

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to the widening and laying out of a street over land of the petitioner and taking away a part of his store standing on the same. The facts in the case were as follows : —

On the 26th of January, 1829, the mayor and aldermen passed a resolve, — " that the public safety and convenience require, that Doane street be widened, from Kilby street to Broad street, to the width of thirty feet; provided, that the same can be effected and the buildings and obstructions removed at an expense to the city, which (in addition to the sum of 1500 dollars already appropriated to that object) shall not exceed the sum of 2000 dollars." A committee appointed to ascertain whether that could be effected at the expense stated, made report to the board of aldermen on the 23d of February, 1829, that certain persons (naming them) " have offered and agreed to execute a good and sufficient bond, with condition to indemnify the city from all damages, costs and expenses incident to the widening said Doane street, in the manner expressed in said resolution ; " and thereupon it was on the same day resolved by the mayor and aldermen, " that the said bondsmen be accepted and approved, and that the mayor be authorized and directed to cause the same bonds to be executed ; and upon the execution and delivery of the same, the said street shall be widened as expressed in said resolution." A bond as here described was accordingly given. Afterward on the
219 5th of March a resolve was passed, " that the public safety and convenience require that Doane street be widened, and the same is hereby widened and laid out in manner following, viz. [here describing the courses and measurements of the street, and the quantity of land taken from the lots of the petioner and others,] and further, that notice be given to Elisha Parks, William Brown and others, proprietors of the buildings on the south side of said Doane street, that so much of their buildings as is necessary for the purpose of effecting the aforesaid resolves, and which stand within the line of said Doane street, thus laid out, will be taken down and removed on the 1st day of June next, unless the same be previously removed by the proprietors thereof." The time here assigned for taking down the buildings in question, was afterwards enlarged.

The petitioner was the proprietor of one of the buildings

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mentioned in this resolve; and, not having removed his building (which was a store), a part of it was cut off and removed by the city, according to the resolve.

March 31*st*

Rand, for the petitioner. A certiorari will lie in this case to the mayor and aldermen; their proceedings have been irregular, and this is a proper remedy. This remedy is not confined to the cases of proceedings in *judicial* tribunals. Besides, the acts of the mayor and aldermen are matters *of record*, by the act incorporating the city, and by other acts; and the city clerk is required to keep such record. *St.* 1816, *c.* 90; 1821, *c.* 110. This Court will interpose, when the inferior tribunals mistake their powers or exercise them improperly; as, in cases under the militia and mill laws. *Commonwealth* v. *Sessions of Middlesex*, 9 Mass. R. 388. In England, this process lies to various bodies; as, the college of physicians, commissioners of sewers, the bishop, mayor of the staple, sheriff, coroner, &c. Com. Dig. *Certiorari*, *A* 1; *Dr. Groenwell's case*, 1 Ld. Raym. 454, and 1 Salk. 144; *Anonymous*, 1 Salk. 146; *Rex* v. *Mayor &c. of Liverpool*, 4 Burr. 2244. The case of *Ball* v. *Partridge*, 1 Siderf. 296, only goes to show, that when such bodies act within the sphere of their authority, the courts in England will not interfere. But our courts have gone further; as in the cases cited; and the opinion expressed in *Harlow* v. *Pike*, 3 Greenl. 438, does not apply; for the mayor and aldermen are not invested with the powers of selectmen only, but also of the court of sessions; and, in the present instance, their act was a judicial one.

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As to the general question, the *St.* 1786, *c.* 67, the first section of which is relied on by the other side, is in accordance with the former laws respecting ways; *town ways*, as well as others, must be such as are *necessary*; the preamble of the provincial statute, 12 *Anne*, *c.* 6 (A. D. 1713), contemplates private ways which are "of absolute necessity."

All the proceedings in the case are to be taken together; and then it will appear throughout, that the mayor and aldermen did not think the public necessity was such as would justify them in laying out the way at the public expense; so far from this, the city is indemnified against any expense at all. The indemnity offered by interested individuals had an influ-

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ence upon the decision of the city officers; this is to be inferred from what appears on the face of their resolve of February 23, 1829, and in the reports of committees, upon which those resolves were founded; and all these acts of the city authorities are proper to be taken into consideration under this application. The resolve passed by the mayor and aldermen on the 26th of January, 1829, which proposes to widen the street conditionally, that is, if the expense shall not exceed a certain sum, is to be taken in connexion with that of March 5, 1829. The remedy now asked for is the more necessary, as the *St.* 1799, *c.* 31, and *St.* 1804, *c.* 73, regulating the subject of streets in Boston, differ from the general highway laws, in not providing for any appeal from the decision of the city authorities; unless a discontinuance may be made of such ways by the Court of Common Pleas. If this cannot be done, then there is no remedy but by certiorari or an action of trespass.

The questions then are, — 1. What are the powers of the mayor and aldermen under the act of 1799; and, 2. whether they have exceeded those powers.

The intent of the act was to authorize the taking of private property, if the public exigencies required it; but, not to take the property of one individual and apply it to the benefit of another. The constitutions of the United States and of Mas-
221 sachusetts both support this doctrine. We have gone greater lengths in this country than any civilized nation has, in taking private property for public uses. The general principles of the law of nations sanction it only when there is a "pressing necessity," "*urgente necessitate.*" Heinec. *Elem. Jur. Nat et Gent. lib.* 2. § 168, 169, 170; Vattel, *bk.* 1, *c.* 20, § 244; Bynkershoek, *Quæst. Jur. Pub. bk.* 2, *c.* 15; Burlamaqui, *Pol. Law, pt.* 3, *c.* 5, § 4, 24, 27; Puffendorf, *bk.* 8, *c.* 5, § 7; Grot. *bk.* 2, *c.* 14, § 7, and *bk.* 1, *c.* 1, § 6, and Barbeyr. notes; see also various cases in notes to Heinec. *ubi supra*, as Livy, *b.* 40, 1 Kings, *ch.* xxi. 2, and Sueton. *Vit. Aug. c.* 56. These examples all show the respect paid to private rights in ancient times and in other countries. The same principle of justice is laid down in 1 Black. Com. 139; though more lately an act of parliament has been passed, 13

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Geo. 3, *c.* 78, resembling ours. See also 2 Johns. Ch. R. 166.

The mayor and aldermen have exceeded their authority, because they have laid out this street on the ground of the indemnity offered, and not exclusively at the expense of the city; and the case does not differ from *Commonwealth* v. *Sawin*, 2 Pick. 547, and *Commonwealth* v. *Cambridge*, 7 Mass. R. 158; in which the bond of indemnity was likewise no part of the record.

It is an objection also to the proceedings, that although the petition does not pray for a widening of the street in its whole length, yet the city undertakes to widen the whole. By the last resolve, too, it does not appear, that notice was given to the parties before the adjudication was made to widen or lay out the street. *Harlow* v. *Pike*, 3 Greenl. 438; *Commonwealth* v. *Chase*, 2 Mass. R. 170; *Commonwealth* v. *Coombs*, 2 Mass. R. 624; *Commonwealth* v. *Peters*, ibid. 229; *Commonwealth* v. *Cummings*, ibid. 171. [*Parker* C. J. But if notice was actually given, as is here the case, we should not grant a certiorari on that ground.] The Court would in their discretion allow it. After our hearing before the mayor and aldermen, further proceedings were had and the bond of indemnity was given, without notice to us. A distinction has been attempted to be made between the case of a county way and a town way, but the opinion of the 222
Court, in *Commonwealth* v. *Sawin*, intimates no such distinction; and the principle of "necessity" is recognised in both. Anc. Charters, 404, 269; *St.* 1786, *c.* 67; 2 Johns. Ch. R. 166; Cod. Justin. *lib.* 8, *tit.* 12, § 9, and Brunneman, *Comm. in h. tit.*

It is said, that our construction of the city powers would put a stop to all public improvements of this nature; but if they are such improvements as are necessary for the public, they will not be prevented. In the present case, the resolve itself shows that the public necessities did not require the widening of the street, unless it could be done for 3500 dollars. Nor is it, as intimated, a mixed case of public and private necessity; that part of the statute respecting private ways is inapplicable. The common benefit or convenience

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ought to be such as to justify the whole expense. The power vested in the mayor and aldermen is very great, and their acts ought to be subject to revision by certiorari. In the case of selectmen of towns, there is a second hearing, that is, by the town itself; and an appeal to the Court of Sessions.

Pickering and *Curtis*, for the respondents. The Court will not grant a certiorari for a mere informality in any case; but in the present case it does not lie at all. The mayor and aldermen have succeeded to the *selectmen*, and have the whole power of those town officers; they do not lay out a street, as surveyors of highways, but as mayor and aldermen; and the only remedy is by action. Of about forty cases of certiorari in our own Reports, there is none of a certiorari to selectmen. The authority to issue writs of certiorari is by the statute of 1782, c. 9, which is confined to cases of criminal jurisdiction; though the definition in Fitzh. Nat. Brev. 245, A, and the practice in England, may be broad enough to include any court of record. Com. Dig. *Certiorari*, *A* 1; *The King* v. *Reeve*, 1 W. Bl. 233. But where the inferior tribunals have a discretion (as commissioners of highways, who may lay out or refuse a road) the Court will not interfere by this process. *Lawton* v. *Commissioners of Cambridge*, 2 Caines's R. 181, by *Spencer* J.; *The King* v. *King*, 2 T. R. 234. But the board of mayor and aldermen is not a judicial court to which
223 this process will lie. In *Ball* v. *Partridge*, 1 Siderf. 296, it was held that this writ does not lie to a new jurisdiction erected by statute, which has a final authority, if it proceeds according to the statute. The mayor and aldermen performed only a ministerial act; as in *Baxter* v. *Taber*, 4 Mass. R. 361, 367; and the remedy is by an action. *Harlow* v. *Pike*, 3 Greenl. 438. In *Craigie* v. *Mellen*, 6 Mass. R. 7, a certiorari would have been resorted to, instead of an action, if the able counsel there had supposed it could be sustained. Although the mayor and aldermen have the general powers possessed by the Court of Sessions at the time of the city charter, yet the *judicial* powers of that court had been transferred to the Court of Common Pleas. Their remaining powers are merely ministerial. By *St.* 1821, c. 110 (city charter), all the powers of the Court of Sessions are divided between the

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Court of Common Pleas and the mayor and aldermen; the *judicial* business being transferred to that court.

The *St.* 1786, *c.* 67, provides for laying out three kinds of ways, — highways, town-ways, and private ways. Of the last, we do not find any adjudged case in our own Reports; but in *Metcalf* v. *Bingham*, 3 N. Hampsh. R. 459, it is decided that a private way laid out for individuals is a town-way. In laying out such a way, too, it is not necessary to have any petition as a rule for their proceedings, but the selectmen may lay it out at their discretion. The party whose land is taken will be entitled to an indemnity; according to the principle in the case cited for the plaintiff from 2 Johns. Ch. R.; and by our statute, if the way is for the benefit of individuals, the compensation is to be paid by them. This is the plain and broad distinction in the proceedings respecting highways and town-ways or private ways. In respect to Boston, the statute of 1799, *c.* 31, has been in operation for thirty years, and no constitutional objection has been made to it; the principles of it have been recognised by subsequent acts. *St.* 1804, *c.* 73, and 1809, *c.* 28. And these acts do not, like the general laws of the State, speak of the necessity of a way, but provide that whenever the *safety* and *convenience* or (according to the second of these acts), the safety *or* convenience of the inhabitants shall require a way to be laid out or widened, it may be done. [*Parker* C. J. These expressions in the two statutes probably mean the same thing.] These acts do not authorize the revision of the doings of the city officers by any other tribunal; except for the damages alone, which, as usual, are to be ascertained by a jury. The statute of 1816, *c.* 90, which authorizes the discontinuance of ways in Boston, is again a recognition of the same principles. The passing of these acts for the city of Boston is a repeal of the general acts; a jury cannot, as in other cases, discontinue a way in Boston, though they may assess damages for a discontinuance or laying out. And, as to the public necessity contended for, in *Commonwealth* v. *Sawin*, 2 Pick. 550, the chief justice says, the statute provides a mode for the laying out of a road which the public convenience does not demand, but which may be useful to individuals. There may also be cases of a mixed character, partly of public and

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partly of private utility. Legal provisions of this kind are more particularly required by the local necessities of Boston; and have been so considered from the time of the provincial statute of 4 *W. & M.* respecting fires in Boston; without them it would be impossible to make gradual improvements in the streets. It is beneficial to the public that arrangements should be made by indemnities, as in this case. In *Commonwealth* v. *Sawin*, the Court do not say that a bond in aid of the town charges would be invalid. It is a common practice in Boston, and other places, for individuals to give their land in order to widen streets; and there can be no difference between giving land and giving money; the argument of the petitioner, that a donation in money, or by bond, would have an improper influence, will apply equally to a donation of land. In *Commonwealth* v. *Cambridge*, 7 Mass. R. 157, *Parsons* C. J. confines his remarks to bonds *colorably* given for the public benefit, but in reality for private use. In the present case the widening was suggested by the great fire which happened in the street, and was deemed necessary for the public safety.

But further; the granting of a certiorari is at the discretion of the Court; it must appear that injustice has probably been done; and before granting it, they will look into the proceed-
225 ings which are objected to. Com. Dig. *Certiorari, D; Drown* v. *Stimpson*, 2 Mass. R. 445; *Ex parte Weston et al.*, 11 Mass. R. 417; *Lees* v. *Childs*, 17 Mass. R. 351.

Now the bond is no part of the record; and the Court cannot go out of that. The final resolve of the mayor and aldermen, by which the petitioner's land was taken, makes no allusion to the bond; and for aught that appears there, all the previous agreements, bonds, &c. may have been relinquished, and the mayor and aldermen may have laid out the way without the least reference to them. There had been various plans and proposals from 1825 to the time of the second resolve (January 29, 1826,) which makes an appropriation only, and says nothing of any bonds; the third mentions bonds, and the last is silent on that point. It cannot therefore be inferred that the bond was the basis of the final adjudication, even if it had been a bond colorably given as in the cases cited.

June 27th. WILDE J. delivered the opinion of the Court This is a

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motion for a writ of certiorari to the mayor and aldermen of the city of Boston, to remove their proceedings in laying out and widening a certain street called Doane street, which proceedings the complainant alleges are erroneous and irregular. To this motion two objections are made on the part of the respondents, —

1. That a writ of certiorari will not lie to the mayor and aldermen, they not being constituted, as it is said, a judicial tribunal.

2. That the proceedings are valid, and in no respect erroneous.

In regard to the first objection, the question is, whether the power vested in the mayor and aldermen as to the laying out and alteration of streets or ways, is judicial or ministerial.

By the statute of 1804, *c.* 73, the selectmen of the town of Boston were empowered to lay out or widen any street, "whenever in their opinion the safety or convenience of the inhabitants of said town shall require it." And by the 13th section of the city charter this power is vested in the mayor and aldermen. We cannot doubt that the power thus conferred is judicial, for before the mayor and aldermen can proceed to lay out a new street, or to widen an old one, they are required to adjudicate on the question, whether the safety or convenience of the citizens requires such a laying out or alteration. It is a power similar to that vested in county commissioners in relation to highways, and no reason can be given why a writ of certiorari should lie to those commissioners, and not to the mayor and aldermen of the city of Boston.

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Whether certiorari will lie to quash the proceedings of the selectmen of other towns in the laying out of town-ways, is a question not raised in this case; for the power vested in the mayor and aldermen is essentially different from that vested in the selectmen of towns. They have only the power to lay out town-ways, but not to establish them. This can only be done by the authority of the town.[1]

It has been contended, that certiorari will not lie to a court newly instituted and empowered to proceed by methods un-

[1] The power of selectmen to lay out highways is not judicial. *Robbins* v *Bridgewater*, 6 N. Hampsh. R. 524.

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known to the common law; and a case from Siderfin was cited in support of this position. This is true as to writs of error, but not as to writs of certiorari. The law seems to be well settled, that certiorari may be awarded to remove the proceedings from any inferior court, whether it be of ancient or newly created jurisdiction; or whether it proceeds according to the course of the common law or not. Bac. Abr. *Certiorari*, *B*; also *Error*, *A* 3, and the cases there cited.

This doctrine was laid down in the case of *Groenwelt* v *Burwell*, 1 Salk. 144, in which it was held that certiorari would lie to the censors of the college of physicians. It is more fully reported in 1 Ld. Raym. 469, and appears to have been a case well considered. So it was decided in a case cited in *Groenwelt* v. *Burwell*, that a certiorari would lie to commissioners of sewers. The same principle was maintained in the case of the Caerdiffe Bridge, 1 Ld. Raym. 580, where the court say they will examine the proceedings of all jurisdictions created by act of parliament, to the end that the court may see whether they keep themselves within their jurisdiction. And in the case of *Lawton et al.* v. *Commissioners of Highways &c.* 2 Caines's R. 182, *Spencer* J. says, that "the authorities to the point decided in the case of the Caerdiffe bridge were so numerous and uniform, that it could not be necessary to enlarge." And he adds, that "the necessity of a superin-

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tending power to restrain and correct partialities and irregularities which may be committed by inferior officers, is so obvious and indispensable, that the court ought by no means to deny themselves a power of such salutary influence." So in the case of *Wood* v. *Peake*, 8 Johns. R. 54, it was held that the appointment of a constable by three justices, they having jurisdiction of the subject-matter, is a judicial act, and remains valid until it is set aside or quashed in the regular course by certiorari. And the same principle is recognised in the case of *Wildy* v. *Washburn*, 16 Johns. R. 49. Cases might be multiplied, but it would be useless.

The uniform distinction is between judicial and ministerial acts; the former being only voidable for error, and the latter being merely void if not done in pursuance of lawful authority. And as judicial acts are valid until reversed for error, a

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writ of error or a certiorari will lie in all such cases. If the proceedings are in a court of record, according to the course of the common law, a writ of error is the proper remedy to reverse or vacate an erroneous judgment, otherwise the remedy is by certiorari.[1] Parks v. Boston.

2. The remaining question is, whether these proceedings are erroneous.

The error assigned is, that the petitioner's land was taken for the accommodation of private individuals, and not for public uses, in violation of the 10th article of the declaration of rights.

But this we think has not been made to appear. The record shows that the mayor and aldermen have adjudicated on the subject, and that they expressly resolved that the public safety and convenience required that the street in question should be widened. The sum of 3500 dollars was appropriated to that purpose, and it does not appear with certainty that that sum was not sufficient to defray the damages and expenses resulting from the measure. But if this did appear, it would not prove that the land taken was not appropriated to public use. If the public necessity and convenience required the alteration, it is immaterial at whose expense it was made. A donation or contribution from individuals to relieve the burden upon the city, has no tendency to prove that the enlargement of the street was not a public benefit. A street or highway is not the less public, because it accommodates some individuals more than others, for this is the case in regard to all 228
streets and ways, and is as applicable to Washington street as to the most insignificant lane in the city. All town ways, although in the *St.* 1786, *c.* 67, they are denominated particular and private ways, are in truth public highways, for the public without discrimination has the right to use them. And this is true as to all open ways, and it is emphatically true in respect

[1] See *Bath Bridge &c. Co.* v. *Magoun*, 8 Greenleaf, 293; *Rulkman* v. *Commonwealth*, 5 Binney, 27; *Phillips* v. *Phillips*, 3 Halsted, 123; *Triggs* v. *Boyce*, 4 Hayw. 100; *Bob* v. *State*, 2 Yerger, 173; *Commonwealth* v. *Hall*, *post*, 440; *Commonwealth* v. *West Boston Bridge*, 13 Pick. 195; *White's Case*, 2 Overton, 109; *Adams* v. *Newfane*, 8 Vermont R. 271; *Robbins* v. *Bridgewater*, 6 N Hampsh. R. 524.

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to the streets of the metropolis and other large towns. Nor is it material at whose expense such streets are laid out or altered. If the legislature should provide for its being done at the expense of the abutters, this clearly would be valid, and no infringement of the 10th article. Such we understand the law to be in New York, and its validity we believe has never been questioned, although it is well known that the principle asserted in our 10th article of the declaration of rights has ever been held sacred by the courts of that State, as a principle of natural justice and universal obligation.

As to the case of *Commonwealth* v. *Sawin*, 2 Pick. 547, it is distinguished from this in a most important point. In that case it appeared, that common convenience and necessity did not require the road prayed for to be laid out wholly at the expense of the town; and it was so adjudged by the Court of Sessions. And it is expressly said in that case, that the Court did not decide that a bond given by an individual interested in a road, to relieve the town, was illegal; but only that such a bargain should not be the basis of an adjudication in favor of a road. And the same distinction is noticed by *Parsons* C. J. in the case of *Commonwealth* v. *Cambridge*, 7 Mass. R. 167. His remarks are applied to streets or ways laid out "colorably for the use of a town, but really for the benefit of an individual."[1]

In the present case it has been adjudicated in unqualified terms, that the public safety and convenience required that the street in question should be widened. The bond given by Adams and others is not made the basis of the adjudication, and it is impossible for us to determine that it would not have been made, if no such bond had been given. This is matter of conjecture, upon which no certain judgment can be founded. Every presumption is to be made in favor of the regu-
229 larity of the proceedings, and they are not to be vacated, unless it can be made to appear with certainty that they are irregular or erroneous, and this certainly does not appear. The proceedings of the mayor and aldermen previous to the final adjudication, may well be considered, without giving them

[1] See *Dudley* v. *Cilley*, 5 N. Hampsh. R. 558; *The Third Turnpike* v *Champney*, 2 N. Hampsh. R. 199.

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a strained construction, as proposals thrown out with a view to procure aid towards defraying the expenses of the proposed measure, and thus to relieve the city from a part of the public burden; and in this there was nothing illegal or irregular.[1]

We are therefore of opinion, that there is no error in the proceedings, and that the petition for a certiorari must be dismissed.

THOMAS H. PERKINS *et al. versus* ROBERT H. GILMAN.

A covenant by the payee of a promissory note not to sue the maker within a limited time, cannot be pleaded in bar to an action brought within the time by a person to whom the note was indorsed after it became due.

ASSUMPSIT. The action was brought on the 24th of July, 1826, the service being by an attachment of the defendant's interest in certain real estate.

The sixth count was upon a promissory note dated at New York, March 26th, 1825, for 787 dollars and 50 cents, payable in six months to T. G. & W. F. Cary, and by them indorsed to the plaintiffs.

The defendant pleaded, that after the making of the note and before it was indorsed to the plaintiffs, viz. on the 15th of October, 1825, T. G. & W. F. Cary, by a letter of license of that date signed with the partnership name by T. G. Cary, and sealed with his seal, in consideration of the defendant's inability to pay his debts, agreed to give him one year from that date to arrange his affairs and collect his debts, and engaged not to attach his goods nor sue or molest him in the mean time; that T. G. & W. F. Cary were at that time the holders of the note, and that they had no other demand against the defendant; and that within the year given by the letter of

[1] Where a sum of money was subscribed by certain individuals for the purpose of defraying a portion of the cost of a town-way, and this fact was communicated to the inhabitants of the town, before the town-way was approved, it was held, that the vote of approval was not rendered invalid thereby. *Copeland* v. *Packard*, 16 Pick. 217. See *Jones* v. *Andover*, 9 Pick. 146, *Freetown* v. *Bristol County Commissioners*, 9 Pick. 46.

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license, viz. on the 20th of July, 1826, they indorsed the note to the plaintiffs, who afterwards within the year commenced the present suit.

To this there was a general demurrer.

By the other pleadings it appeared, that the note was given by the defendant upon the purchase of goods consigned by the plaintiffs to T. G. & W. F. Cary, commission merchants at New York, for sale; but the defendant alleges that he did not know, before the letter of license was executed, that the goods belonged to the plaintiffs.

June 9th. *W. H. Gardiner*, admitted that the same defence might be made against the plaintiffs as against the payees of the note, but he contended that a covenant not to sue within a limited time could not be pleaded in bar to the note. *Harrison* v. *Close*, 2 Johns. R. 448; *Cuyler* v. *Cuyler*, ibid. 186; Bac. Abr. *Covenant*, *L*, and *Release*, *A* 2; *Deux* v. *Jeffries*, Cro. Eliz. 352; 2 Wms's Saund. 48*a*, note; *Davey* v. *Prendergrass*, 2 Chit. Rep. 342; *Chandler* v. *Herrick*, 19 Johns. R. 134; *Gibson* v. *Gibson*, 15 Mass. R. 112.

S. Hubbard and *W. J. Hubbard*, *contrà*, said the defendant could have no remedy on the covenant; not against the plaintiffs, because they were not parties to it; nor against the payees, because they did not bring this action; so that if this plea is not sustained, the defendant is without remedy. The letter of license is a contract, not merely between a creditor and the debtor, but virtually between all the creditors who signed it; and if one creditor recovers his whole debt, all the others are injured.

June 27th. Wilde J. delivered the opinion of the Court. It is a well settled principle, that a covenant never to sue an existing demand is equivalent to a release; not that such a covenant is in fact a release, but it is allowed so to operate, to avoid circuity of action. But a covenant not to sue for a limited time does not operate as a release, nor can it be pleaded in bar in an action upon an obligation or other demand. Bac. Abr. *Covenant*, *L*; *Ayloffe* v. *Scrimpshire*, Carth. 64; *S. C.* 1 Show. 46; *S. C.* 2 Salk. 573; 2 Saund. 48, *in notis*; *Gibson* v. *Gibson*, 15 Mass. R. 112. And in an action of assumpsit, a parol agreement not to sue has a similar operation, and for the same

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reason. *Dow* v. *Tuttle*, 4 Mass. R. 414. But if there is a covenant or agreement not to sue within a limited time, and a stipulation that the demand shall be forfeited if sued within the time limited, such an agreement not to sue and stipulation of forfeiture, may be pleaded in bar of an action on the demand brought within the period of limitation; because such a stipulation is considered as an agreement for liquidated damages commensurate to the amount of the demand; whereas, without such stipulation, the damages to be recovered for the violation of an agreement not to sue, are not to be measured by the amount of the debt or demand, but may be more or less, according to circumstances. *White* v. *Dingley*, 4 Mass. R. 433.

According to these principles, the plea in bar to the sixth count would be bad if the action had been brought in the names of the original promisees, and *a fortiori* in an action in the name of a *bona fide* indorsee. The letter of license or agreement not to sue, was made by T. G. & W. F. Cary, without any authority from the plaintiffs, so that no action would lie against the plaintiffs on that agreement. The defendant's remedy for the violation of that agreement, is by action against T. G. & W. F. Cary, and the principle adopted to avoid circuity of action is not applicable.[1]

If an obligee gives a release to one of several obligors, all the obligors are thereby discharged; yet if the obligee covenants not to sue one of several obligors, it will not operate so as to discharge the other obligors, for the covenant is not a release in its nature, but only by construction, to avoid circuity of action.[2]

We are therefore of opinion, that the plaintiffs are well entitled to judgment on the sixth count; and the other pleadings are immaterial.

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[1] See *Clopper* v *Union Bank of Maryland*, 7 Har. & Johns. 92; *Hoffman* v. *Brown*, 1 Halsted, 429; *Fullam* v. *Valentine*, 11 Pick. 159; *Winnans* v. *Huston*, 6 Wendell, 471.

[2] See *Lane* v. *Owings*, 3 Bibb, 247; *Shed* v *Peirce*, 17 Mass. R. 623. *Walker* v. *M'Culloch*, 4 Greenleaf, 421.

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JOHN DORR *et al. versus* PASCHAL P. POPE.

Where in assumpsit on a policy of insurance on a ship, the declaration alleged that the ship, by force and arms and in a hostile manner, was captured, seized and taken by certain armed soldiers and thereby wholly lost, and the plaintiff proved by witnesses, that she was seen in the possession of armed soldiers in a foreign country, and that she never returned home, it was *held*, that he had made out, *primâ facie*, a loss, and that he was not bound to read in evidence the record of a trial and decree of condemnation, which he had in court and which he offered to the defendant to be used by him if he thought proper.

ASSUMPSIT on a policy of insurance upon the ship Esther, at and from Boston to Valparaiso, and at and from thence to all ports and places to which she may proceed, backwards and forwards, until her return to her port of discharge in the United States, the risk commencing December 14, 1821, and being limited to two years from that time, against perils of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of princes, &c.

The plaintiffs aver their loss thus: — "While the ship was at Callao, then under the Peruvian government and in the kingdom of Lima, to wit, on the 28th of December, 1822, she, with a part of her cargo then on board, with force and arms and in a hostile manner, was captured, seized and taken by certain armed soldiers, and thereby the ship and cargo became wholly lost to the plaintiffs, and of no use to them."

The subscribing of the policy by the defendant, the interest of the plaintiffs, and an abandonment in September, 1823, were proved or admitted.

The plaintiffs then, to prove the loss, read the deposition of one Harrison; who testified, that he arrived at Callao about the 29th of January, 1823, and that from that time until the following June he resided in the city of Lima; that during all that period Callao was in the possession of the Patriot or Republican party; that he saw the ship Esther, early in 1823, at Callao, after her seizure and while in the possession of the Patriot government, with a file of soldiers on board; that he understood she was condemned between March and June, 1823, but that he was not in the court-house during the trial. The plaintiffs also examined a witness, who testified that the Esther,

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after sailing from Boston, had never returned there. This witness, being cross-examined, testified, that he had heard that she had been tried at Callao; that he had heard Dorr, one of the plaintiffs, say that she had been condemned at Lima, but Dorr also said, at the same time, that the condemnation was unjust and irregular.

The defendant then read a letter from the plaintiffs, dated November 12, 1823, addressed to the agent of the underwriters and referring to a copy of the translated documents of condemnation by the Patriot government of Peru; the originals of which were admitted to be in the plaintiffs' hands at the trial, and by them were offered to the defendant, if he chose to use them.

The defendant here insisted, that the plaintiffs were not entitled to recover upon this evidence, and the plaintiffs having rested the case here, the jury were instructed, that the plaintiffs were entitled to a verdict; and a verdict was returned accordingly.

June 10th.

Gorham and *Loring*, for the defendant, contended that if the evidence had a tendency to prove a loss in the manner set forth in the declaration, yet that the plaintiffs had not produced the best evidence which the nature of the case would admit. The seizure, unless it was illegal, was not a loss for which the underwriter was answerable. The presumption is, that the trial and condemnation were legal and the seizure justifiable; and the burden was on the plaintiffs to prove the contrary. They were bound to produce the record of the trial and condemnation, as it was in their possession. 1 Stark. Ev. 389; 3 Stark. Ev. 1251; *Williams* v. *E. I. Company*, 3 East, 192.

Hubbard and *Sumner*, *contrà*, said the plaintiffs had made out, *primâ facie*, a loss by seizure of the vessel, and the burden was on the defendant to prove that the seizure was lawful. In practice, the record of condemnation is often produced on the part of the underwriter. *Fisher* v. *Ogle*, 1 Campb. 418; *Lee* v. *Boardman*, 3 Mass. R. 238; *Baxter* v. *N. E. Mar. Ins. Co.* 7 Mass. R. 275; *Ludlow* v. *Dale*, 1 Johns. Cas. 16; *Francis* v. *Ocean Ins. Co.* 6 Cowen, 406; *Coster* v. *Reed*, 6 Barn. & Cressw. 19; *Mitchell* v. *N. E. Mar. Ins. Co.* 6 Pick. 117.

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Dorr v. Pope. June 27th.

Per Curiam. The proof is, that the ship was seen in the possession of armed soldiers at Callao, and that she never returned. This was certainly sufficient, had not the witness who testified to the latter fact, stated that he had heard she had been tried at Callao, and that he had heard one of the plaintiffs say she had been condemned, but unjustly and irregularly. It is contended that this state of the evidence required that the plaintiffs should produce the record of trial and decree of condemnation, the same witness having seen documents relating to the trial in the plaintiffs' possession. We do not think that this evidence imposes the duty on the plaintiffs of producing those documents in support of their action, which was maintained without them. A condemnation was not alleged, nor was it necessary to be proved. It may be that the evidence called for would defeat their action, and it is quite enough for them to tender the documents to the other party.

Motion to set aside the verdict overruled.

COMMONWEALTH *versus* HEZEKIAH NEWTON.

June 27th. ON an indictment against a victualler, for a violation of *St.* 1816, *c.* 112, § 1, on the 13th of November, by keeping his shop open on the evening of the Lord's day, it was held, that, by the words, "any part of the Lord's day or evening," the legislature intended Sunday and the evening immediately following sunset on that day; and not the evening immediately preceding Sunday. It was also held, that the indictment was sustained by proof, that the shop was kept open on any Sunday evening preceding the finding of the indictment and within the time limited for prosecuting such an offence.

S. D. Parker, for the defendant.

Davis, Solicitor-General, for the Commonwealth.

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HENRY LIENOW *versus* URIAH RITCHIE.

Where real property is in the possession of a lessee, other than a tenant at will, case, and not trespass, is the proper form of action to be brought by the landlord for an injury by a stranger, affecting the inheritance, even where trespass would be the proper remedy if the landlord were himself in possession.

THIS was an action on the case brought by the owner of a house for cutting away a part of it while it was in the occupation of his tenant for the term of one year. After a verdict for the plaintiff, it was moved in arrest of judgment, that trespass, and not case, was the proper form of action.

S. D. Parker, in support of the motion, cited *Morgan* v. *Hughes*, 2 T. R. 231; *Day* v. *Edwards*, 5 T. R. 648; *Savignac* v. *Roome*, 6 T. R. 128; *Ogle* v. *Barnes*, 8 T. R. 188; *Starr* v. *Jackson*, 11 Mass. R. 520. *June 10th*

D. A. Simmons and *Gay*, *contrà*, cited *Ward* v. *Macauley*, 4 T. R. 489; Hammond's N. P. 15, 28, 29; *Taylor* v. *Townsend*, 8 Mass. R. 411; *Commonwealth* v. *Bigelow*, 3 Pick. 31; 1 Chit. Pl. 142; *Jesser* v. *Gifford*, 4 Burr. 2141.

Per Curiam. The facts found show a proper ground for an action on the case. The plaintiff, not being in actual possession, nor having the right to possession against his lessee, could not maintain trespass. Case is the proper remedy for the landlord, when an injury is done to the inheritance.[1] *June 27th*

The case of *Starr* v. *Jackson* affirms this doctrine, and only decides that trespass *may* be maintained by the landlord when the lessee is only tenant at will, not that case, even under those circumstances, would not lie.[2]

Judgment according to verdict.

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[1] See *Hall* v. *Snowhill*, 2 Green, 8; *Randell* v. *Cleaveland*, 7 Connect. R. 328.

[2] See *Hingham* v. *Sprague*, 15 Pick. 102. In New York, case only will lie even where the land is in possession of tenant at will. *Campbell* v. *Arnold*, 1 Johns. R. 511; *Tobey* v. *Webster*, 3 Johns. R. 468. See also *Revett* v. *Brown*, 5 Bingh. 7; *Harper* v. *Charlesworth*, 4 Barn. & Cresw. 574, and cases cited in *Starr* v *Jackson*, 11 Mass. R. (Rand's edit.) 527, note (*a*).

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Samuel Bonsey *versus* Josiah L. C. Amee.

In assumpsit, to recover one quarter of the proceeds of the sale of a vessel and of her earnings previously to the sale, the plaintiff, in support of his title, produced a bill of sale of one quarter thereof from S, who with three others was the first owner of the vessel. The defendant produced a paper, executed previously to the sale to the plaintiff, by all the first owners, whereby they agreed to "pledge" to the defendant the vessel, then building as security for his advances thereon, and to allow the defendant to buy any part of the vessel, at a certain rate per ton. The vessel was afterwards sold by the defendant; but his advances amounted to more than the proceeds of the sale and earnings. *Held*, that the last mentioned instrument was not an absolute transfer, nor a mortgage, nor a pledge; and that without a delivery of the vessel, it was incompetent to avoid the subsequent transfer to the plaintiff.

Assumpsit for money had and received. The plaintiff claimed to recover one quarter of the proceeds of the sale of a vessel and one quarter of her earnings before the sale, the whole proceeds of the sale and earnings of the vessel having been received by the defendant.

At the trial, before *Wilde* J., the plaintiff, in support of his claim, produced a bill of sale of one quarter part from one Stinson, who was the first owner of the vessel, in common with three other persons.

The defendant relied on a paper, not under seal, executed by Stinson and the other first owners, previously to the sale of one quarter part to the plaintiff by Stinson. By this instrument, they "pledged" to the defendant "the hull of a vessel," then building by them, as security for the payment of advances made, or to be made, by him on the vessel; which payment was to be made when the vessel should be completed; and it was also agreed therein, that the defendant might take any part of the vessel when completed, he paying therefor twenty dollars per ton, provided she was not disposed of previously to her coming to Boston.

The vessel was subsequently sold by the defendant; but his advances for the building of it amounted to more than the proceeds of the sale and the earnings.

The judge instructed the jury, that the legal title did not pass to the defendant, by the last mentioned instrument; that it was evidence only of a pledge, and would not constitute a lien on the vessel, unless accompanied with possession.

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Bonsey v. Amee.

A verdict was found for the plaintiff. The defendant moved for a new trial, on the ground of a misdirection to the jury.

June 11th

Dunlap, in support of the motion, contended that the vessel was mortgaged to the defendant, and that he had a constructive possession of the vessel by means of the workmen, whom he paid; besides, it is not necessary that possession should accompany the deed of transfer, except in cases of pawn. Jac. Law. Dict. *Pawn*; ibid. *Mortgage*; *Ward* v. *Sumner*, 5 Pick. 59; *Conard* v. *Atlantic Ins. Co.* 1 Peters's Sup. Ct. R. 449; *Edwards* v. *Harben*, 2 T. R. 587; *Brooks* v. *Powers*, 15 Mass. R. 244; Bigelow's Dig. *Sale*, *B*; *Glover* v. *Austin*, 6 Pick. 209; *D'Wolf* v. *Harris*, 4 Mason, 515; 1 Fonbl. Eq. 145.

Warner, for the plaintiff, cited *Mucklow* v. *Mangles*, 1 Taunt. 318; *Stringer* v. *Murray*, 2 Barn. & Ald. 248; Powell on Mortg. 3; *Brown* v. *Bement*, 8 Johns. R. 75; *Robinson* v. *M'Donnell*, 2 Barn. & Ald. 134; *Hay* v. *Fairbairn*, 2 Barn. & Ald. 193; *Monkhouse* v. *Hay*, 8 Price, 256; *Mair* v. *Glennie*, 4 Maule & Selw. 240; *Robinson* v. *Macdonnell*, 5 Maule & Selw. 228; *Sturtevant* v. *Ballard*, 9 Johns. R. 337; *Homes* v. *Crane*, 2 Pick. 610; [2d edit. note 1;] 6 East, 27, note; *Man* v. *Shiffner*, 2 East, 523; *Heywood* v. *Waring*, 4 Campb. 291.

June 27th

PARKER C. J. We suppose from the statement of the case, that the plaintiff had good title to one quarter part of the vessel, which he purchased of Stinson, unless the defendant had before acquired a title or a legal lien by the writing produced by him, signed by the four owners, including Stinson who afterwards sold to the plaintiff.

The writing, on which the defendant relies, did not transfer the absolute title in the vessel, for that would have been contrary to the intention of the parties, nothing more being designed than a security for advances which the defendant might make towards the building and equipping the vessel; for in the same instrument provision is made for a future purchase, if the defendant should elect to buy any part, unless the owners should themselves dispose of her before.

The instrument does not amount to a mortgage, for it does not appear that there was any delivery of the vessel; and a

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Bonsey v. Amee. 238

delivery is necessary to constitute a mortgage of a chattel;[1] besides, the vessel not being in existence as such, the instrument created only an executory contract, not a sale, conditional or absolute. *Mucklow* v. *Mangles*, 1 Taunt. 318; *Robinson* v. *M'Donnell*, 2 Barn. & Ald. 134; *Stringer* v. *Murray*, 2 Barn. & Ald. 248.[1]

Neither can it amount to a pledge, because to constitute this kind of contract there must be not only a delivery over, but a continued possession by the pledgee of the thing pledged; and as soon as the thing is restored, the pledge ceases to exist.[2] Now it does not appear that there was any delivery over or possession of the vessel. The plaintiff's title to one quarter is maintained.

The instrument on which the defendant relies, not amounting to a mortgage, or a pledge, or an absolute transfer, for the reasons before given, we can perceive no way in which he could have acquired a lien upon the vessel so as to defeat a subsequent purchaser *bonâ fide* and for a valuable consideration. The transaction has more analogy to a contract of bottomry, than to either species of contract mentioned. But it cannot avail in that form, because no ship was in existence when the contract was made, and the circumstances are not such as will justify a bottomry. In short, it seems to be an incomplete contract, for want of delivery or possession, and wholly incompetent to avoid a subsequent transfer. Had there been any evidence of knowledge, on the part of the plaintiff, of the advances made by the defendant, and the contract of

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[1] See *Carrington* v. *Smith*, 8 Pick. 419; *Butterfield* v. *Baker*, 5 Pick (2d edit.) 525, and note 1. This is said to be contrary to the current of the authorities in Story's Comm. on Bailments, (2d edit.) 197, note 4. See *Bullock* v. *Williams*, 16 Pick. 33; *Forbes* v. *Parker*, 16 Pick. 462.

[1] See Long on Sales (Rand's edit.) 287; *Clark* v. *Spence*, 4 Adolph. & Ellis, 448; *Simmons* v. *Swift*, 5 Barn. & Cressw. 857; *Sumner* v. *Hamblet*, 12 Pick. 82, 83; *Rhode* v. *Thwaites*, 6 Barn. & Cressw. 388; *Goode* v. *Langley*, 7 Barn. & Cressw. 26; *Atkinson* v. *Bell*, 8 Barn. & Cressw. 277; *Carruthers* v. *Payne*, 5 Bingh. 270; *Woods* v. *Russell*, 5 Barn. & Ald. 946; *Oldfield* v. *Lowe*, 9 Barn. & Cressw. 73.

[2] See Story's Comm. on Bailments, (2d edit.) 197, 201 *et seq.*; *Lee* v. *Bradlee*, 8 Martin, 20; *Macomber* v. *Parker*, 14 Pick. 497; *Ash* v. *Savage*, 5 N Hampsh. R. 547; *Haven* v. *Low*, 2 N. Hampsh. R. 13; *Ward* v. *Sumner*, 5 Pick. 60.

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.he owners with the defendant, before the plaintiff purchased, his purchase might be deemed fraudulent and void; but, on the supposition that there was no such knowledge, his title is valid.

Judgment according to verdict.

JOSEPH H. PEIRCE *versus* JOHN DORR. 239

A bill in equity sets forth, that on March 7, 1811, P conveyed land to D as security for a debt; that on March 21, P conveyed other land to D as security for a sum then lent to P; that these conveyances were by absolute deeds, and that no writing or instrument of defeasance was taken at the time; that the two transactions were entirely independent of each other, but that D, taking advantage of P's necessities, connected them together; that P, in October 1811, repaid the sum lent, and requested D to reconvey the land which he held as security for that sum, but that D, instead thereof, gave a note promising to pay that sum with interest, when the lands should be sold, provided they should produce the sums expressed in the deeds, with interest, and if not, the deficit was to be considered as part payment of the note; that in 1813, by a writing signed by D and P, reciting that D had purchased the lands and that P was desirous of repurchasing them, D agreed, that upon payment of a specified sum in two years with interest, he would reconvey the lands, and that if a fair price could be obtained before the expiration of the two years, he would sell a part or the whole, and apply the proceeds to his debt and pay over to P any surplus; and that the note was thereupon given up to D; and the bill alleged that this was a trust, and that D should perform the trust. *Held*, that all the previous agreements were merged in this last, and that this was not a trust within the St. 1817, *c.* 87.

THIS was a bill in equity, brought by the plaintiff in his own right and as executor of the last will of Joseph Peirce.

The bill charges, that on March 21, 1811, Dorr lent to Joseph Peirce 3000 dollars, and that Peirce thereupon, as security for the loan, executed to Dorr an absolute deed of certain lands in Maine, without taking from him any memorandum in writing or instrument of defeasance; that on April 2, 1811, Peirce, at the request of Dorr, returned 1000 dollars, and thereupon Dorr gave him the following note: — "Boston, April 2, 1811. Value received I promise to pay Joseph Peirce one thousand dollars with interest, when certain lots of land at West Boston, which I bought of him, as by the deed of the 7th of March last, and certain other lots and lands which I purchased of him lying in the District of Maine, as by the deed of the 21st of March last, shall have been sold, provided

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Peirce v. Dorr.

they produce in cash with interest the several sums expressed in the respective deeds, and if not, the deficit is to be considered as part payment of this note. John Dorr;" that on the 4th of October following, at the like request of Dorr, Peirce returned him 2000 dollars, the rest of the sum lent, and Dorr ought to have reconveyed the lands in Maine, and Peirce re-
240 quested him so to do; but Dorr refused, and in lieu thereof gave Peirce a note like the one above recited, except as to the date and the sum; that the transaction of March 21, 1811, was wholly distinct from any other transaction between the parties, but that Dorr availed himself of the embarrassed state of Peirce's affairs at the time, and of his age and infirmities, to connect it with a transaction of March 7, 1811, and declared that he would reconvey the lands in Maine, on the final settlement of their dealings; that on March 7, 1811, Peirce was indebted to Dorr, according to Dorr's statement, in the sum of 2272 dollars, to secure the payment of which sum Peirce executed to Dorr an absolute deed of two lots of land lying at West Boston; that these lots exceeded in value the debt due to Dorr, and that it was understood that Dorr should sell the same, and after deducting from the proceeds the debt due to himself, should pay the surplus to Peirce; that it was not necessary for the security of Dorr, that he should retain the lands in Maine, and that Peirce submitted to it because he supposed himself to be without remedy; that Peirce made repeated requests to Dorr to sell the lots in Boston, and upon his refusal, proposed that Dorr should reconvey to him one of the lots, in order that he might, by the sale thereof, raise money to satisfy the claim of Dorr, but that Dorr refused this request also; that during this negotiation Dorr delivered to Pierce a statement of the account between them, in which he charges 105 dollars "for commissions and care" as trustee, and also sent to Peirce the form of an obligation, proposed to be executed by Dorr, releasing one of the lots in Boston, and binding himself to release the other lot and the lands in Maine, upon Peirce's paying 3497 dollars, with interest, within two years from December 14, 1811; that on May 3, 1813, Dorr and Peirce signed a writing as follows:—"Be it known to all men, that whereas John Dorr purchased of Joseph Peirce two cer-

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ain lots of land at the westerly part of Boston, as described in a deed on record dated 7 March, 1811; also certain other lands and an island, &c. as described in a deed on record dated March 21, 1811; and whereas it is the desire of said Peirce to repurchase said lots, land and island; be it known, that it is now mutually agreed, that upon the payment made to Dorr his heirs or assigns, of the sum of 3296 dollars 46 cents, 241
in two years from the 27th day of March last, together with interest from said day, which said Peirce hereby agrees to do, and also to pay any further sum that may then be due to said Dorr, the latter hereby agrees to quitclaim to him said Peirce, his heirs or assigns, all the said lots, land and island, &c. And to facilitate the accomplishment of this agreement, said Dorr agrees to quitclaim in like manner either or all said lots, land and island whenever, before the two years before named have elapsed, a fair price can be obtained therefor, and to apply the proceeds, so far as the same will go, to the payment of the aforesaid sum or sums and interest on the same. And should any money remain in said Dorr's hands thereafter, the same shall be paid to said Peirce;" that the two notes signed by Dorr on the 2d of April and 4th of October, 1811, were thereupon delivered by Peirce to Dorr; that prior to the execution of this writing and the giving up of these notes, Dorr exhibited a statement of the account between him and Peirce (which is set forth, and which includes these notes); that by force of the writings and statements of Dorr set forth in the bill, he held the lands in Boston and Maine in trust eventually for the benefit of Peirce, for the purpose of selling the same and applying the proceeds in satisfaction of the debt due to himself, and paying over the surplus, if any, to Peirce; that Dorr continued to hold the lands, though solicited by Peirce to dispose of them, they being, as Dorr knew, the only fund out of which the debt could be paid, and that Peirce, despairing at last of obtaining justice, wrote and signed, on the 1st of January, 1826, a declaration (which is made a part of the bill) in which he states, that having involved himself in debt by indorsing certain notes, he borrowed 3000 dollars of Dorr, for the purpose of taking up his indorsements, and proposed to mortgage to Dorr, for his security, certain lands in Maine, but

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that being advised by counsel that a mortgage would not be safe, since he might be considered as thereby secreting his property from creditors, he made an absolute deed as the safer course, and for no other reason, as Dorr must have known; that in April and October, 1811, he returned the 3000 dollars to Dorr in the identical bank bills which he had received from
242 him, and he expected the transaction to be cancelled; but that Dorr refused to cancel it, saying it had better stand till the whole was settled; that this transaction stands alone, unconnected with any other; that he could not comprehend the object of Dorr's offering him the two conditional notes, after he had received back the whole of the consideration money; that he was not satisfied to have it stand so, as he wanted to sell the land; that Dorr said he could sell the land as well as Peirce, that the conveyance was never considered to operate as a mortgage, that he had bought the land of Peirce; that he (Peirce) had tried to effect an acknowledgment of Dorr's having received back the money with which he held up the idea of his having bought the land; and Peirce suggests that the communications between them on the subject may amount to a mortgage; that Peirce died January 1, 1828, having made a will, and that letters testamentary were granted to the plaintiff in February; that on the 19th of April the plaintiff required Dorr to render an account of his trust and to perform the same according to the true meaning and intent thereof, more especially to sell the lands in Boston and apply the proceeds to his debt; objecting however to the allowance of interest after a reasonable time from the original conveyance had elapsed, in which he might have effected sales; but that he has neglected to do either.

The prayer of the bill is, that the defendant may be held to render an account of his trust and make such conveyances to the plaintiff as he shall be entitled to have; and also for general relief.

To the foregoing bill the defendant demurred, assigning for cause of demurrer, that this Court has no jurisdiction in equity to enforce the specific performance of contracts in writing, except by virtue of *St.* 1817, *c.* 87, which applies only to contracts made since the passing of the statute; that the plaintiff

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claims the specific performance of a contract which he alleges was made on May 3, 1813; and that except that contract, there is nothing set forth in the bill which will entitle the plaintiff to relief in a court of equity. Peirce v. Dorr

S. Hubbard and *W. J. Hubbard* supported the demurrer. This is not a case of trust within the meaning of the statute of 1817, *c.* 87. *Black* v. *Black*, 4 Pick. 237. *June* 11*th*.

The agreement of May, 1813, sets forth the truth, that the original transaction was an actual *bonâ fide* sale. All previous dealings between Dorr and Peirce were merged in that. It was made before the statute of 1817, so that a specific performance cannot be decreed; but if it had been made since, the Court could not interfere under this bill. There is no allegation of an offer to pay the debt within the two years, and the Court will not compel the defendant to take the risk of the market after that time. The case of *Benedict* v. *Lynch*, 1 Johns. Ch. R. 370, shows that in a sale of land, time may make part of the essence of the contract, and that the Court will not help the party in default at the day. The value of these lands has never been equal to the amount of the debt, including the interest. The defendant always has been and still is willing to reconvey, upon payment of his debt and interest according to the terms of the contract of May 3, 1813, but he would not admit that he was guilty of negligence and allow a deduction of interest on that ground, and hence arose this suit. 247

The transaction was not a mortgage, the writing not being under seal, nor made at the same time with the deed. But if it were, a reconveyance would not be decreed without a tender of the sum secured.

The written declaration of Joseph Peirce, that the conveyance of the lands in Maine was a separate transaction, is of no avail; and it contradicts the written contracts. Moreover, taking his statement to be true, that conveyance was to delay creditors, and shall he allege his own fraud and claim a reconveyance? He says too that the 3000 dollars were returned, and that the lands should therefore have been reconveyed; but if the transaction was intended to be closed, why did he not pay the interest on that sum?

Thacher, for the plaintiff. The plaintiff does not claim the

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Peirce v. Dorr.

specific performance of a contract, but the execution of a trust arising under a deed. If there is no trust, we have no case The contract of 1813 cannot be specifically performed, but we are remitted to our original rights ; and we pray for general relief. A trust need not be created by writing ; it is sufficient if it is proved by written evidence. *Movan* v. *Hays*, 1 Johns. Ch. R. 342 ; *Forster* v. *Hale*, 3 Ves. 707. The bill alleges
244 an absolute conveyance in 1811 as security, and a repayment of the whole consideration ; there is then a resulting trust. *Boyd* v. *M'Lean*, 1 Johns. Ch. R. 586 ; *Lloyd* v. *Spillet*, 2 Atk. 150 ; *Botsford* v. *Burr*, 2 Johns. Ch. R. 405. The instrument of May 1813 is clear evidence of the trust. It contains an assertion which is not true, namely, that the lands had been purchased by the defendant. If the conveyance was in reality absolute, why were the conditional notes given by the defendant, by which a deficit was to be borne by Peirce, and why did the defendant charge a commission for his care ?

June 27th. WILDE J. delivered the opinion of the Court. The material facts set forth in the bill being admitted by the demurrer, the question is, whether upon these facts the plaintiff is entitled to the relief prayed for ; whether the writings and statements set forth in the bill, will admit of the construction contended for by the plaintiff's counsel.

As to the two conditional notes, no inference can be made from them in favor of the trust set up by the plaintiff. On the contrary, the condition or proviso was evidently inserted for the security of the defendant, and to provide against the contingency of an unfavorable sale, in case the proceeds should fall short of the sums due to the defendant. These notes therefore clearly fail to support the trust set forth in the bill. For as the deficiency of the proceeds of sale is provided for, and no provision is made for paying over the surplus, the presumption would be, if any were to be made, that the surplus was not to be accounted for.

Nor does the defendant's proposal of December 1811, with the statement of the account between the parties accompanying it, support the trust relied on in the bill. These papers may show that the lands were held upon some trust, or that some

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trust was intended to be raised; but what the trust was, or what it was intended to be, does not appear. The proposal was to release to the testator one of the lots in Boston and to hold the residue of the lands as security for the defendant's balance; but it does not appear, nor is it averred, that this proposal was accepted; nor were the accounts then settled. The proposal however, with some modification, was afterwards, in May, 1813, accepted by the testator, and formed the 245
basis of the agreement then made. The notes of hand were then given up and cancelled, and all prior proposals must be considered as waived by that agreement. The accounts between the parties were then settled, and it was agreed that the lands should be held as security for the defendant's balance. According to the construction of that agreement the most favorable to the plaintiff, it operated in the nature of a mortgage. In strictness, however, it was not a mortgage; and to entitle the plaintiff to a release of the lands, the defendant's debt should have been paid within the time limited by the agreement. It is unnecessary however to consider this question, as no payment or tender of payment has been made at any time.

With regard to the letter from Joseph Peirce, it must be taken as part of the bill, as it is averred to be true. But it does not support the trust set out in the bill. It shows, it is true, that the loan of 3000 dollars and the conveyance of the lands in Maine were a separate transaction, and not connected with the previous dealings between the parties. In the close of the letter it is intimated, that the conveyance of the lands in Maine might be considered as a mortgage; but if it were a mortgage, it is clear that the plaintiff would not be entitled to a release of the lands without paying the interest, as well as the principal sum loaned. Besides, whatever were Peirce's expectations, they could be of no avail after the agreement of May, 1813. It is not intimated in the letter that any subsequent agreement was ever made between the parties; and it is certainly impossible, under the agreement of 1813, to support the bill in its present form.

Bill dismissed.

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STANDFAST SMITH *versus* JOSIAH DUNHAM.

A person, who sees the promisor of a note sign it, has no right, at another time, to subscribe his name as a witness to the note, without the consent or knowledge of the promisor; and therefore his thus subsequently putting his name as a witness, will not bring the note within the exception in the statute of limitations in regard to witnessed notes.

A note was signed by the maker in the presence of the attorney of the payee, the attorney having previously written upon it the word "*Witness*" in the usual place, and intending to subscribe it himself as a witness. But he did not inform the maker of his intention of witnessing the note, and accidentally neglected to put his name to it as a witness while the maker was present. Two or three hours afterward the attorney subscribed his name as a witness, the maker not being present and not knowing or consenting to his so subscribing, and then delivered the note to the payee. *Held*, that the note was not so witnessed as to avoid the statute of limitations.

But it *seems*, that the attorney having acted *bonâ fide*, his thus signing as a witness was not such an alteration as would render the note void.

ASSUMPSIT by the payee against the maker of a promissory note, dated July 12, 1819, for 350 dollars, payable on demand. The defendant pleaded *non assumpsit infra sex annos*. The plaintiff replied that the note was made and signed by Dunham at the time and place when, &c. "in the presence of one witness, who then and there attested the same." The defendant took issue on this allegation.

At the trial, before *Wilde* J., G. E. Head testified, that he wrote the note declared on, and that it was signed by the defendant on the day of the date in Head's office, he then being attorney for the plaintiff. Head did not know whether Dunham read the note before signing it, but presumed that he did. The note, before Dunham signed it, had the word "*Witness*" written on it in the place where witnesses usually sign their names, and with the intention of Head to sign it as a witness; though nothing was said to Dunham about the note's being to be witnessed. There was much conversation at the time between Dunham and Head, which withdrew Head's attention from witnessing the note while Dunham was present, and he did not subscribe his name as a witness in Dunham's presence. In two or three hours after, Head went to an insurance office, to deliver the plaintiff the note. When he handed it to the plaintiff, the plaintiff observed that it was not witnessed, and that he should like to have it witnessed. Head immediately

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wrote his name as a subscribing witness, Dunham not being present and having no knowledge of this fact.

The judge, upon this evidence, ordered a nonsuit, subject to the opinion of the whole Court.

C. G. Loring, for the plaintiff. Where a promissory note is signed in presence of a witness, though nothing may have been previously said by either party, the promisee may have it attested by the witness, even if the promisor does not assent; and such attestation would bring the case within the exception in *St.* 1786, *c.* 52, § 5. The statute makes no particular mode of attestation necessary; the only object being to preserve a sufficient proof of the execution of notes which are not to be barred by the lapse of six years. The essential point is, to have the attestation true; and where the paper remains all the time in the hands of the witness, he cannot be mistaken as to its identity or genuineness. *June* 12th

It was the intention of the parties that Head should subscribe as a witness. The evidence is conclusive on the defendant in this respect, and the jury should have been so instructed. That it was the intention of the plaintiff's agent, appears by his oath; and that it was the intention of the defendant, appears on the face of the note. He must have assented to Head's attesting the note, because, before signing, he must have seen the word "*Witness*," which is more conspicuous than any other word, and he must have known that Head, the only person present, was to be the witness. But if the evidence was not conclusive, then the question whether it was the intention of the parties that Head should witness the note, should have been left to the jury. *Kershaw* v. *Cox*, 3 Esp. R. 246; *Knill* v. *Williams*, 10 East, 431.

If Head had a right to attest the note, and if it was the intention of the parties that he should do so, the attestation was not an alteration which vitiated the note. *Hunt* v. *Adams*, 6 Mass. R. 519; *Cole* v. *Parkin*, 12 East, 471; *Parke* v. *Mears*, 2 Bos. & Pul. 217; *Smith* v. *Crooker*, 5 Mass. R. 538; *Lewis* v. *Brigham*, 4 Barn. & Ald. 672; *Hall* v. *Chandless*, 4 Bingh. 123. It was in truth not an alteration, but actually a completion, of the original contract.

S. D. Parker, for the defendant. Head's subscribing his 248

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name as a witness was such an alteration of the note as rendered it void, for it was increasing the liability of Dunham. *Homer* v. *Wallis*, 11 Mass. R. 309; *Booth* v. *Johnson*, 7 Mod. 144; *Master* v. *Miller*, 4 T. R. 320; *S. C.* 2 H. Bl. 141; *Marson* v. *Petit*, 1 Campb. 82, note; *Long* v. *More*, 3 Esp. R. 155, note; *Henfree* v. *Bromley*, 6 East, 312; *Langham* v. *Cologan*, 4 Taunt. 330; *Markham* v. *Gonaston*, Cro. Eliz. 626; *Speake* v. *United States*, 9 Cranch, 38. The alteration, being material and made without the consent of the defendant, the party to be affected by it, does not fall within the principle of any of the cases in which an alteration has been held not to avoid an instrument. *Hatch* v. *Hatch*, 9 Mass. R. 311.

The note was not witnessed in the manner the statute contemplates, for it ought to have been subscribed by the witness at the time it was signed, so as to make the attestation a part of the same transaction. *Wright* v. *Wakeford*, 4 Taunt 218; Archb. Dig. 378; *M'Graw* v. *Gentry*, 3 Campb. 232; *Lemon* v. *Dean*, 2 Campb. 636, note; *Parke* v. *Mears*, 2 Bos. & Pul. 217; *Park* v. *Mears*, 3 Esp. R. 171; *Abbot* v. *Plumbe*, 1 Doug. 216; *Phipps* v. *Parker*, 1 Campb. 412.

June 27th. PARKER C. J. delivered the opinion of the Court. To the statute of limitations pleaded by the defendant, the plaintiff replies that the note was made and signed by the defendant at the time and place when, &c. and in the presence of one witness, who then and there attested the same; and issue is taken on the allegation.

The question is, whether this allegation was proved by the plaintiff, or whether there was evidence of the fact which would have justified a verdict thereon in favor of the plaintiff.

The exception in the statute of limitations, (*St.* 1786, *c.* 52, § 5,) is "of any note in writing made and signed by any person or persons, and attested by one or more witnesses."

Do the facts in this case prove an attestation within the meaning of the statute? We think they do not; that it was the intention of the legislature, in making this wide discrimination between notes attested and not attested, that the attestation should be made at the time of the making of the note, and before the transaction is complete, with a view to give it in some

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measure the character of a specialty and put it on the footing of a bond or other specialty; that with the attestation, it is in fact a different legal contract, from what it would be without; and that the party to whom it was given, could not, after its delivery, change its character so materially, without the knowledge or consent of the promisor.

We do not suppose that this would amount technically to an alteration of the note, so as to defeat the plaintiff's right to recover on it within six years, or upon evidence of a new promise after six years, because there was no fraudulent intent, and because the witness was actually present and saw what his name purports to attest. And therefore the case is not like the case of *Homer* v. *Wallis*, 11 Mass. R. 309, which has been cited.[1] But this note was not "attested by one or more witnesses" at the time it became a perfect contract by the signature of the defendant, and the delivery of it to Head, who stood in the place of the plaintiff. We cannot distinguish between an attestation made two or three hours after the contract is completed, and one made two or three weeks, months or years, and it is obvious, that to adopt a rule admitting of so broad an application, would destroy the distinction established by the legislature, between attested and non-attested notes. Even at the trial the witness who should testify that he was present and saw the defendant sign the note, would seem to us to have as good a right to place his name on it, to avoid the statute, as in this case Head had two or three hours after the note was given.

The strongest case cited for the plaintiff is that of *Parke* v. *Mears*, 2 Bos. & Pul. 217. The witness Hearne was not in the room in which the bond was executed, and therefore did not see it signed and sealed, but he was in an adjoining room.

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[1] See *Brackett* v. *Mountfort*, 2 Fairfield, 115; 1 U. S. Dig. *tit. Alteration of Instruments.* The holder of a bill has no right to make an alteration in it to correct a mistake, unless to make the instrument conform to what all parties to it agreed or intended it should have been. *Hervey* v. *Harvey*, 15 Maine R. (3 Shepley), 357; *Granite Railway Co.* v. *Bacon*, 15 Pick. 239. It is not necessary that the witness to a signature should see the party sign his name to the instrument. If the person who signs, acknowledges it to be his signature, and requests the person witnessing the same to affix his name as a witness, it is sufficient, *Bridge* v. *Mathes*, 7 N. Hampsh. R. 230.

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The defendant in the action was present and heard the attorney ask Hearne to attest the bond. Hearne knew the defendant's handwriting, and the defendant had acknowledged the bond. His consent therefore to the attestation of Hearne was a necessary inference. Had Dunham in this case been in the insurance office and heard the plaintiff say to Head, that the note
250 was not witnessed, and seen Head put his name to it, he might have been estopped to deny that it was an attested note. We think there is no evidence from which a jury can legally infer that the attestation of Head, made as it was, was by the consent of the defendant. The word "*witness*" at the bottom of the note is too common to have excited attention; and the fact, that the defendant was not present and had no knowledge of what was done, seems to exclude the inference of consent. Nothing can be inferred from what took place when the parties were together, more than that it was the intention of the parties that the note should be witnessed when it was made.[1]

Nonsuit made absolute.

HENRY WILLIAMS *et al. versus* PAUL SPAFFORD.

Where one purchases goods upon an examination of a specimen taken by him out of a small aperture in the case in which the article is contained, this is a sale by sample.

Where an article was purchased in that manner, as a seroon of indigo, but the greater part of the contents of the seroon proved to be a different substance, and the remainder to be indigo of a quality inferior to the specimen, it was *held*, that the seller was liable to the purchaser in assumpsit on a warranty, that the article sold was indigo of the same quality as the sample.

ASSUMPSIT upon a warranty in the sale of a seroon (or leather bag) of indigo. On one side of the seroon was cut a small triangular hole, at which the purchaser might draw out a specimen, and at the sale the plaintiff examined the article in this mode. In the bill of parcels the article was described as "one seroon of indigo." The greater part of the contents of

[1] See Revised Stat. *c.* 120. § 4, which enacts that the provisions of the statute of limitations shall not "apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness, provided the action be brought by the original payee, his executor or administrator."

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the seroon proved to be a substance resembling burnt clay, colored so as to look like indigo, and at the end of the seroon there were from seven to ten large pieces of leather and bones; and what indigo there was in the seroon was of an inferior kind and not like the specimen. The defendant was innocent of the fraud.

Williams v. Spafford.

Merrill, for the defendant, cited *Parkinson* v. *Lee*, 2 East, 314, and Day's note at *p.* 324; *Harvey* v. *Young*, Yelv. 21, and Metcalf's note; *Oneida Manuf. Soc.* v. *Lawrence*, 4 Cowen, 440; *Gray* v. *Cox*, 6 Dowl. & Ryl. 200. He said this was not a sale by sample. [See *Meyer* v. *Everth*, 4 Campb. 22; *Gardiner* v. *Gray*, ibid. 144; *Sands* v. *Taylor*, 5 Johns. R. 404.]

June 13th.

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Morey, *contrà*, relied on *Bradford* v. *Manly*, 13 Mass. R. 139, and *Hastings* v. *Lovering*, 2 Pick. 214.

Per Curiam. The indigo was sold by sample; and that is a warranty that the bulk is of the same kind and quality with the sample.[1]

June 27th

Defendant defaulted.

[1] See Long on Sales, (Rand's edit.) 191, 192; *Gallagher* v. *Waring*, 9 Wendell, 20; *Beebe* v. *Robert*, 12 Wendell, 413; *Andrews* v. *Kneeland*, 6 Cowen, 354; *Boorman* v. *Johnson*, 12 Wendell, 566; Chitty on Contr. (4th Am. edit.) 360.

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JOSEPH HODGES *versus* JAMES GALT.

Two notes dated in October and falling due in January and February following, were indorsed by the defendant, who was an Englishman, a master mariner and an unmarried man, having no home in this country, and, when in England, residing in Liverpool. On the 12th of December he wrote from Boston to the holder at Providence, that he should leave Boston in a day or two for Liverpool, but in fact he remained in Boston till the middle of March. The holder did not know of this fact nor of his residing in Liverpool, and sent no notice to him of the dishonor of the bill; neither did it appear that the holder made any inquiries for his residence. *Held*, that due diligence had not been used to give notice to the indorser.

ASSUMPSIT on two promissory notes dated October 7, 1826, made by Hugh Hill, payable, one in three months, the other in four months, to Hugh M'Kibbin & Co. of New York, or order. The notes were indorsed by the defendant to the plaintiff. They were lodged in the Eagle bank in Providence for collection, and were sent by that bank to the Franklin bank in New York for collection, and were returned to the Eagle bank, protested for non-payment, and were taken up by the plaintiff.

No notice was given to the defendant, of the dishonor of the notes. He was a master mariner and a single man, having no place of residence in this country known to the plaintiff, other than as hereinafter stated. He was in Boston from the time when the notes were indorsed by him, until March 17, 1827, boarding at a public house. On December 12, 1826, he wrote to the plaintiff that he had been unexpectedly detained in Boston, that he should leave that place in a day or
252 two, and should probably be in Liverpool in six or eight week. The plaintiff had no knowledge of his remaining in Boston after the date of this letter, nor had he any communication with him by letter or otherwise after that time. The defendant is an Englishman, and, when in England, resides in Liverpool, but of this fact the plaintiff had no knowledge.

The question was whether the defendant, as indorser, was discharged by laches on the part of the holder.

June 13th. *Sumner*, for the plaintiff.

Peabody, for the defendant, cited *Chapman* v. *Lipscombe*, 1 Johns. R. 294; *Blakely* v. *Grant*, 6 Mass. R. 386; *Fish-*

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er v. *Evans*, 5 Binney, 543; *Bank of Utica* v. *De Mott*, 13 Johns. R. 432; *Merchant's Bank* v. *Birch*, 17 Johns R. 25; *Stewart* v. *Eden*, 2 Caines's R. 121.

Hodges v. Galt.

The *Court* said that due diligence had not been used on the part of the plaintiff; that he should have put a letter into the post-office directed to Boston, or if he received the defendant's letter and knew where he was going, he should have sent a notice to Liverpool; but he made no effort to give any notice.[1]

June 27th

Plaintiff nonsuit.

WILLIAM S. BIRD *versus* RICHARD RICHARDSON.

Assumpsit on the following memorandum, viz. "It is agreed that B is to have the refusal of a certain farm situated &c. which was bought by me for the sum of 1940 dollars upon his complying with certain conditions from the first day of April next which conditions the aforesaid B has complied with." *Held*, that this was a valid contract, and that it expressed the price of the land to be conveyed.

ASSUMPSIT. The declaration alleged, that the defendant, by his memorandum in writing, promised to convey to the plaintiff a certain farm for the sum of 1940 dollars, and averred a breach.

At the trial, before *Wilde* J., the plaintiff, in support of his claim, offered in evidence the following memorandum, "Boston, January 4, 1827. It is agreed and understood that William S. Bird is to have the refusal of a certain farm situated in Ashby commonly called the Waters farm which farm was 253
bought by me for the sum of 1940 dollars upon his complying with certain conditions from the first day of April next which conditions the aforesaid William S. Bird has complied with Richard Richardson."

The defendant objected to the admission of this evidence as not supporting the declaration, and contended that the memorandum did not prove that the defendant agreed to convey the

[1] See *Robinson* v. *Hamilton*, 4 Stewart & Porter, 91; *M'Murtrie* v. *Jones*, 3 Wash. Circ. C. R. 206; *Bank of Utica* v. *Phillips*, 3 Wendell, 408; *Bank of Utica* v. *Davidson*, 5 Wendell, 587; *Dunlap* v. *Thompson*, 5 Yerger, 67; 7 Monroe, 579; 2 Stewart & Porter, 428.

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Bird v. Richardson.

farm to the plaintiff for the sum of 1940 dollars, but only that he bought it for that sum. This objection was sustained by the judge, and a nonsuit was ordered. Whereupon the plaintiff moved for a new trial.

June 13th. *S. D. Ward*, for the plaintiff.

Peabody, for the defendant.

June 27th. *Per Curiam.* The parties intended to make a contract, and we must look to their probable meaning. We think that the written contract set forth is valid, and that it expresses the price to be paid for the land to be conveyed.[1]

New trial granted.

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254 GEORGE M. GIBBENS *versus* DAVID PEELER.

The St. 1817, c. 87, giving equity jurisdiction in cases of trust arising "in the settlement of estates," was intended to reach those implied trusts which are charged upon executors and administrators by reason of the duties, or neglect of duties, which devolve upon them in consequence of their appointment to those offices *Semble.*

A trust created by an intestate in his lifetime, by a fraudulent conveyance of property which is wanted by his administrator for the payment of debts, is not embraced within the foregoing exposition of that statute.

But whether in such case an implied trust does not arise for the benefit of creditors, which the administrator may enforce under that statute, *quære.*

Where an insolvent person, just before his decease, delivered to a friend, upon a secret trust and for the purpose of defrauding creditors, a promissory note, which the trustee refused to give up or show to the administrator of the deceased, it was *held*, that the note was so secreted and withheld as that it could not be come at to be replevied, within the meaning of St. 1823, c. 140, and that, by virtue of this statute, the administrator might maintain a bill in equity for discovery and relief.

Held, that it was not necessary in order to lay a foundation for such bill, that a writ of replevin should have been first taken out.

Held, that the trustee could not plead an offer made after the suit was commenced but before the filing of an amended bill, to produce the notes to an officer so that they might be taken on a writ of replevin.

THIS was a bill in equity brought by Gibbens as administrator of Benjamin Porter. In an amended bill it is alleged, that Porter died indebted to the plaintiff and others, in the sum of 700 dollars and upwards; that Porter colluded with the de-

[1] See *Atwood* v. *Cobb*, 16 Pick. 227.

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fendant, and a short time before his death, for the purpose of defrauding his creditors, delivered to the defendant two negotiable notes, each for 320 dollars, made by John Elmsley to Elisha Preston and indorsed in blank by Preston; that the plaintiff cannot produce any evidence to maintain an action at law to recover possession of the notes, nor the value of them, nor the money which may have been received thereon by the defendant; that these notes and the sum of 19 dollars constitute the whole of Porter's estate; that the plaintiff caused the defendant to be cited to appear before the Probate Court, and that he appeared and admitted his possession of the notes, but refused to disclose what consideration, if any, he paid therefor, or to exhibit the notes; that he never did pay any consideration for the notes, but received them on a secret and fraudulent trust, which can be disclosed by him only, to apply the proceeds to the maintenance of a child of the deceased, and to 259
prevent their being applied to the payment of his debts; that the plaintiff has repeatedly applied to him to deliver up the notes, but he has hitherto refused, and that he has secreted and withheld them so that they cannot be found or come at to be replevied. The prayer of the bill is for discovery and relief.

The defendant pleads that the notes have not been secreted nor withheld so that they cannot be found or come at to be replevied; and that long before the filing of the amended bill, he gave particular notice to the plaintiff and to his solicitor, that he had always held and should continue to hold them subject to a suit of replevin, and that he was ready, at any moment, to deliver them up to the proper officer, when such suit should be instituted. The plaintiff filed a replication.

Sullivan said that the plaintiff had no remedy at law, but *June 26th*
that this was a case of trust "arising in the settlement of an estate," and therefore the plaintiff was entitled to a bill in equity by virtue of *St.* 1817, *c.* 87. He cited *St.* 1805, *c.* 90, § 5; 1783, *c.* 33, § 11, 12; *Martin* v. *Root*, 17 Mass. R. 222; *Adair* v. *Shaw*, 1 Sch. & Lefr. 259, 261; *Humphreys* v. *Humphreys*, 3 P. Wms. 349; *Thompson* v. *Brown*, 4 Johns. Ch. R. 619; *Burlingame* v. *Bell*, 16 Mass. R. 318; *Thomas* v. *Goodwin*, 12 Mass. R. 140.

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Gibbens v. Peeler.

The bill may likewise be sustained under *St.* 1823, *c.* 146, for the notes were so "secreted and withheld, that they could not be found or come at to be replevied." *Hawes* v. *Loader*, Metcalf's Yelv. 197, and cases there cited; *Pope* v. *Tillman*, 7 Taunt. 642.

Fletcher, *contrà*. This is not a trust arising in the settlement of an estate. If there is any trust, it was created in the lifetime of the intestate. If this is a trust within the statute of 1817, then every debtor to the estate of a person deceased is a trustee within the statute; which proves too much.

Replevin might have been sustained; so that the case is not within the statute of 1823. The plaintiff says he has not the means of describing the notes so as to replevy them. The statute does not require that he shall be furnished with information for that purpose; it says only that if the property

256 "cannot be found or come at," the party may have a remedy in equity. But the plaintiff has in his bill described the notes with sufficient particularity to maintain replevin. It is said, however, that if the plaintiff brought an action, he could not prove that the defendant is not the *bonâ fide* owner of the notes. But the statute does not say he shall resort to chancery for want of evidence to sustain a suit at law. The words are imperative, that the property must be so secreted or withheld that it cannot be replevied. A bill in equity cannot be sustained without a previous attempt to replevy. It is objected that the notice to the plaintiff, that the bills were held subject to be replevied, was subsequent to the commencement of this suit; but an amended bill is considered as an original bill; it is an entirely new thing. *Smith* v. *Brown*, 3 Madd. Ch. R 428; *Abingdon* v. *Butler*, 1 Ves. jun. 209.

June 27th. PARKER C. J. delivered the opinion of the Court. The question presented by the pleadings in this case, is whether this Court has, by virtue of any of the statutes conferring upon it jurisdiction in equity, authority to entertain the suit, so as to grant the relief prayed for in the bill.

We are very clear that there is no such authority given by the statute of 1817, *c.* 87; which limits the jurisdiction to cases of trusts arising under deeds, wills, or in the settlement of estates. There being no deed or will, the question is con-

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fined to the last species of trusts mentioned in the statutes, viz. those which arise in the settlement of estates. The definition of this phrase has never been settled, and it is difficult to ascertain the precise meaning of the legislature in the use of it. There must be a trust, and it must arise in the settlement of estates. Trusts created by settlements, according to the technical use of that word in England, could not have been intended, for they are created by deed or will, and are therefore provided for expressly by statute. We can see no reasonable exposition of the term, unless it was intended to reach those implied trusts which may be charged upon executors or administrators by reason of the duties or neglect of duties, which devolve upon them in consequence of their appointment to and acceptance of such offices; possibly also heirs may be charged with trusts within this description, in virtue of the settlement of estates upon one or more of them by a decree of the judge of probate, where the estate does not admit of an equal division.[1] 257

The case presented by the bill is not embraced within this exposition, for if any trust exists, it was created by the deceased proprietor of the notes in his lifetime, and it is not such a one as the plaintiff would seek to enforce. Whether when chattels or evidences of debt are put into the hands of a friend by an insolvent person, for the purpose of preserving them for his family, against the rights and interest of his creditors, a trust does not arise to the administrator, who succeeds to all the property of the deceased, and who represents the creditors, is a question which has not arisen with us, though we cannot doubt such would be the decision of a court of chancery in England. If such a trust does arise, it might be well said that it arises in the settlement of an estate, for the administrator must settle the estate, and in order to do it, he must look up and possess himself of the effects and credits of the deceased. We do not therefore decide that our jurisdiction over this case depends entirely upon the statute of 1823, c. 140; but believing that the case comes within this statute, we give no decisive opinion as to other sources of jurisdiction.

It must have been considered by the legislature, that the

[1] See *Campbell* v. *Sheldon*, 13 Pick. 23.

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existing provisions of law were defective, when they enacted this last statute. This provides, that in all cases where any goods or chattels, deed, bond, note, bill, specialty, writing or other personal property, of any person or persons, shall be taken or detained from him or them, and secreted or withheld, so that the same cannot be found, or come at, to be replevied, the justices, &c. on application by bill, petition or complaint, may order the same to be delivered up, or compel such discoveries and disclosures, and make such orders, injunctions and decrees, and upon such terms and conditions, as equity shall in such case seem to require.

The bill states that two promissory notes belonging to Porter deceased, were just before his death delivered by him to Peeler, the defendant, upon a trust between them that the notes should be held by Peeler for the support &c. of a child of Porter; that Porter died insolvent, and that the purpose and effect of the trust were to conceal the property, so that it could
258 not be applied to the payment of his debts. This act was a fraud upon the creditors, and the notes so delivered would be the property of the administrator of Porter, as soon as he should be appointed; so that the plaintiff, in that capacity, is within the description of persons entitled to a bill under the statute. The only question then is, whether the notes were so situated as to be the proper subject of this statute remedy.

Considering the statute as in a high sense remedial, we are not disposed to give it such a close construction as would be likely to exclude cases within the mischief intended to be redressed. Honest defendants can in no case be injured by this process, for their own statement under oath will protect them, unless satisfactory proof can be brought to contradict them, and according to the rules in chancery, their answer cannot be effectually contradicted by a single witness. Have the notes then been taken or detained by the defendant from the plaintiff? If his property, they have been detained, for they are admitted to be in the defendant's possession, and upon demand upon him to deliver them up, they have been refused. Have they been secreted or withheld, so that they cannot be found, or come at, to be replevied? Upon this point the argument has principally turned. We think the proceedings in the Probate Court, and

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the answer by the defendant to the interrogatories there put, are competent evidence here, as the answer to a bill in chancery would be, in a suit at common law. By those answers the defendant refused to produce the notes, claiming them as his own property. They were therefore withheld, and so that they could not be found, within the meaning of the statute. Nor could they be come at to be replevied, for unless exposed, an officer could not take possession of them; he had not the power to extort them from the pocket of the defendant, nor could he, by arresting his person, compel him to deliver them up.

We think it not necessary, to lay a foundation for this process, that a writ of replevin should first be taken out, and that the officer should return on it that he could not obtain possession of the goods or papers; any more than it should be required to try an action at law and fail in it, in order to show that there was not a plain and adequate remedy at law, before 259
a bill in equity should be sustained. It is enough that it shall appear to the court by the facts stated in the bill, admitted or proved, that the goods or papers sought to be delivered up, were so controlled by the defendant that an attempt to replevy them would probably be fruitless. So with goods or chattels; if they should be locked up in a cellar or closet, or otherwise concealed, so that an officer with a writ could not find them to replevy, they may be the subject of this process, without any attempt to replevy them. And in this respect there is a similitude between this process under this statute, and the general trustee process, which applies only when the goods and effects are so held that they cannot be come at to be attached. It has been determined in the case of *Burlingame* v. *Bell*, that though physically they may be attached, yet if they are held by a fraudulent transfer, the holder may be summoned to answer as a trustee.

We think then, there having been a demand for these notes before the filing of the bill and a refusal to deliver or even to show them, that they being of a nature to be concealed in the pocket of the defendant so that they could not be found, and being invisible so that they could not be replevied, the case is brought clearly within the provisions of the statute.

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But it is objected that after the filing of the bill, and after a hearing upon a demurrer, and an order to amend, there was a formal offer to produce the notes to any officer, so that they might be taken on a writ of replevin; and that as this was done before the demanded bill was filed, the case is clearly taken out of the statute. We cannot adopt this argument. If a right of action existed at the time of filing the original bill, it was a vested right which would not be defeated by a subsequent act of the defendant. The amendment of the bill is a continuance of the former process, not the institution of a new one. The suit was still pending in court. If the bill had been dismissed and a new one filed and in the interval the notes had been offered, the argument would apply. But in the actual state of things, the offer to give the complainant a right to another action could no more affect his existing right, than a tender in a common law action would defeat the action, if made before an amendment, which had been ordered, had been filed.

260 We are therefore of opinion, that this plea should be overruled, and that the defendant be held to answer the bill.[1]

[1] See *Holland* v. *Cruft*, 20 Pick. 28, *et seq.*

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BENJAMIN ADAMS *et al. versus* THOMAS CORDIS, Trustee of Samuel Williams.

When a foreign creditor sues for his debt in this State, he will recover (except in the case of a bill of exchange) at the par of exchange.

So if the debtor here is summoned upon the trustee process, he will be charged at the par of exchange.

Where one summoned as trustee is indebted to the principal defendant on a demand drawing interest, and he continues, after the service of the writ upon him, to use the money due, he is chargeable with interest up to the time when the money is demanded of him upon the execution against the fund in his hands; but where interest would be recoverable by the principal defendant, only as damages for breach of contract, it will not accrue during the pendency of the trustee process.

One summoned and charged as trustee is not entitled to retain a part of the fund in his hands, for the payment of fees of his counsel.

Where property in the hands of the trustee is claimed by an assignee of the principal defendant, the trustee is not obliged to disclose the assignment and contest the right of the attaching creditor, without an offer of indemnity against the expenses of the suit. *Semble.*

SCIRE FACIAS By the answers of Cordis filed in the original action, it appears, that at the time of the service of the original writ upon him as trustee, in 1825, he had an open account with Williams, who was a banker in London, England, upon which he admits he was indebted to Williams in the sum of 673*l.* 8*s.* 4*d.* sterling, equal, at the par of exchange, to 2992 dollars and 96 cents. To a question, whether, if he had been called upon by Williams, previously to the service of the original writ, for the balance then due, he was not bound to pay Williams at London by remitting to him bills of exchange at the rate of exchange at the time, Cordis makes answer, that he has sometimes made payments in shipments and occasionally remitted bills; but that he never made any particular agreement with Williams upon the subject. He also states, that an interest account was kept between himself and Williams, and that conformably to their usual mode of dealing, he should have paid Williams interest at the rate of five per cent, if the business and payment had not been interrupted by Williams's 261
failure and by the service of the trustee process on the respondent. He further states, that he has not held a specific amount in his hands for the sole purpose of paying the balance

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due to Williams, but that he has been always ready to pay the amount due, whenever he should be called upon by any person authorized to receive it; that he has always, since the service of the original writ, had a balance remaining dead at the bank, and often to an amount as large as the balance due to Williams; and that he could have hired money at even less than five per cent per annum.

It was agreed that the rate of exchange, at the time of the service of the original writ, was above par, and has continued to be above par ever since.

Cordis was adjudged trustee upon the original process; and upon an execution issued against Williams and his trustee, in August, 1828, Cordis, on the 5th of September following, paid 2798 dollars and 41 cents, which sum was indorsed on the execution in part satisfaction; and he refused to disclose or expose any other goods, effects or credits of Williams.

The respondent retained, of the amount due to Williams, the sum of 194 dollars and 55 cents, for his expenses, fees of counsel for advice, draughting answers, &c. in the original process in this case, and other suits instituted against him as trustee of Williams.

The case was argued at the bar, by *Bassett*, for the plaintiff, and *Smith* and *Sewall*, for the trustee. The case of Charles Saunders against Williams, as principal defendant, and John Forrester, as his trustee, involving the same questions, was argued at the same time by *Saltonstall*, for the plaintiff and *J. Pickering*, for the trustee. The counsel for the trustee having been stopped by the Court on the points relating to interest and counsel fees, and the Court having subsequently expressed an opinion adverse to them on those points, they were permitted to furnish an argument in writing, and the Court thereupon revised their opinion.

For the plaintiff it was contended, 1. that the trustee was to be charged with the rate of exchange. The money was advanced by Williams in pounds sterling, upon a contract that Cordis should replace it in London; and, but for this
262 process, Cordis would have remitted the amount in bills at the rate of exchange current at the time of purchasing the bills. If he pays the debt here, justice requires that for each

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pound sterling, he should pay so many dollars and cents as will replace that amount in London. Had the rate of exchange been ten per cent below par, instead of ten per cent above par, at the time when the debt was arrested in his hands by this process, would the Court have compelled him to pay at the par of exchange, thus subjecting him to a loss of ten per cent? M'Vickar's Considerations &c. on Protested Bills of Exchange, 52; Bayley on Bills, (Phillips & Sewall's edit.) 23, 237, 239; *Smith* v. *Shaw*, 2 Wash. Circ. Ct. R. 168; *Lanusse* v. *Barker*, 3 Wheaton, 146; *United States* v. *Barker*, 1 Paine, 179; *Hendricks* v. *Franklin*, 4 Johns. R. 119; *Graves* v. *Dash*, 12 Johns. R. 17; *The Zephyr*, 3 Mason, 341; *Cropper* v. *Nelson*, 3 Wash. Circ. Ct. R. 125; Code de Commerce, *liv.* 1, *tit.* 8, *Art.* 143, note; *Atkinson* v. *Braybrooke*, 4 Campb. 380.

2. The trustee having mingled the money due to Williams, with his own funds, and having used it in trade, is justly chargeable with interest as an incident to the debt. *Pease* v. *Parker*, 3 Caines's R. 266; *Lynch* v. *De Viar*, 3 Johns. Cas. 303; *Wood* v. *Robbins*, 11 Mass. R. 504; *Reid* v. *Rensselaer Glass Factory*, 3 Cowen, 404; *Liotard* v. *Graves*, 3 Caines's R. 226; *Gibbs* v. *Bryant*, 1 Pick. 118; *De Havilland* v. *Bowerbank*, 1 Campb. 50.

3. The trustee had no right to retain any sum for fees of counsel.

The counsel for the *trustee* insisted, that he was not liable for the rate of exchange. The advance of exchange, at the time this suit was brought, was owing in part to the difference in currency between the United States and England, and in part to the expense of transporting specie. 1. With regard to the difference of currency. By law, both gold and silver are standards of value in the United States. The law makes ten silver dollars worth a gold eagle, but in fact ten and a half silver dollars are not worth that coin. In consequence, all gold has been withdrawn from the currency of the country, and our standard is practically silver. In England, gold, and not silver, is the standard, silver not being a tender for any sum above 40 shillings. The comparative value of gold having been since the par value of the pound sterling was fixed by

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Congress, it now requires a greater amount of silver to purchase an English pound than it did then. If a person were to carry 4 dollars and 44 cents in silver to England, he could not purchase a pound sterling or a gold sovereign; he must carry about 4 dollars and 80 cents. But 4 dollars and 44 cents in American gold are worth nearly a pound sterling in England. The laws of the United States have, however, made 4 dollars and 44 cents of our silver equal to 4 dollars and 44 cents of our gold; and the Court cannot undertake to say that they are not equal. The fault lies in the laws of the United States, which have endeavoured to fix the relative value of gold and silver; a thing in its nature fluctuating. J. Q. Adams on Weights and Measures, 143. 2. The other part of the advance on exchange arose from our imports from England exceeding our exports to that country. The balance having to be paid in cash, the expenses of transporting gold and silver to that country to pay the balance would of course regulate the price of bills. The debt being claimed in this country, there is no reason that the debtor should pay the expense of transporting it to England.

Most of the cases cited on the other side relate to bills of exchange, which are *sui generis* and are governed by rules of their own. The rate of exchange is there allowed by statute. The damages do not include reëxchange, but are intended as a penalty to insure payment of the bill. *Grimshaw* v. *Bender*, 6 Mass. R. 157; Bayley on Bills (Phil. & Sewall's edit.), 238; *Martin* v. *Franklin*, 4 Johns. R. 124; *Scofield* v. *Day*, 20 Johns. R. 102; *Pope* v. *Barrett*, 1 Mason, 124; *Napier* v. *Schneider*, 12 East, 420; *Woolsey* v. *Crawford*, 2 Campb. 445.

If Williams had brought an action against Cordis, he might have recovered interest; but here the plaintiff and the assignees of Williams were contending for the funds in the hands of Cordis, and the property being locked up by the authority of the law, so that he was prohibited from paying the debt to either at pleasure, to charge him with interest during the pro-
264 hibition, would be unreasonable, and contrary to the authorities. *Prescott* v. *Parker*, 4 Mass. R. 170; *Fitzgerald* v. *Caldwell*, 2 Dallas, 215; *Hoare* v. *Allen*, ibid. 102: *Foxcraft*

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v. *Nagle*, ibid. 132; *Knight* v. *Reese*, ibid. 182; *Fitzgerald* v. *Caldwell*, 1 Yeates, 274; *Richards* v. *Salter*, 6 Johns. Ch. R. 445; *Rensselaer Glass Factory* v. *Reid*, 5 Cowen, 604, 620; *Sickman* v. *Lapsley*, 13 Serg. & Rawle, 224; *Conn* v. *Penn*, 1 Peters's Circ. Ct. R. 524; *Bordley* v. *Eden*, 3 Har. & M'Hen. 167; *Du Belloix* v. *Waterpark*, Bayley on Bills, (Phil. & Sewall's ed.) 234, note; *Child* v. *Devereux*, 1 Murphy, (N. Car.) 398. The *St.* 1794, *c.* 65, charges the trustee with only the "goods, effects and credits of the principal" which were in the hands of the trustee "at the time the writ was served upon him;" so that if interest did not cease to run when the writ was served, what has accrued since cannot be recovered in the present suit. It is like rent falling due after the service of the trustee process. The plaintiff insists that Cordis has had the use of the money, and therefore in equity he ought to pay interest; but it does not appear that such use was beneficial to him, and the Court will not go into that inquiry. And besides, the trustee process is strictly a legal and not an equity process.

The trustee may well retain from the funds in his hands, the expenses incurred by him in answering to the original trustee process. It was owing to no fault in him that that suit was instituted; he could not prevent it; and he could not protect himself, except by appearing, and making a disclosure, and submitting to the Court the question, whether he would be justified in paying over his creditor's money to a stranger. It was a serious and important question, whether the assignees of Williams under the commission of bankruptcy had not a better title than the plaintiff to the property in question. *Blake* v. *Williams and Trustee*, 6 Pick. 286, [2d edit. 315, note 1.] Williams was obviously in fault in not paying his debt to the plaintiff, and his property, the fund in litigation, ought therefore to pay these expenses. The trustee was obliged to incur them in consequence of having the fund in his possession; and they may be compared to storage paid by a trustee upon goods attached in his hands. *Ellery* v. *Gouverneur*, 3 Martin's (Louisiana) R. 606; *Sickman* v. *Lapsley*, 13 Serg. & Rawle, 224; *Paris* v. *Gilham*, Cooper's Chan. Rep. 56; *Aldrich* v. *Thompson*, 2 Bro. C. C. 149; *Att. Gen.* v. *City of London*, 265

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1 Ves. jun. 246. The uniform practice in this Commonwealth has been, for the trustee to retain a sum to pay his costs, and from the reasonableness of the thing his right to do so has never been questioned.

June 27th.

PARKER C. J. delivered the opinion of the Court. This *scire facias* is brought in order to obtain execution for a sum supposed to be in the hands of the trustee, not disclosed or paid over by him on execution, consisting of the difference of exchange, the interest upon the balance of the account between him and Williams, and the sum retained for expenses; and we are to determine whether all or either of these items are chargeable upon the trustee in this suit.

In regard to the exchange, it appears by the answers, that it was considerably above par at the time of the service of the writ; so that if a remittance had been made by bills, 10 or 12 per cent advance must have been paid for them; and the debt being to be paid in England, justice, as well as the usage of business, it is thought, requires that the creditor should receive the full value of his debt there.

We do not find however any authority for making this the rate of damages, when a foreign creditor sues for his debt in this country, except in the case of a dishonored bill of exchange; in which case, by general usage, the rate of exchange is estimated as part of the damages to be recovered. This is supposed to be founded on the custom of merchants, and seems limited to the case of a protested bill of exchange; and different usages prevail in different countries, in regard to the amount to be allowed and the manner in which it shall be done, it being included in the sum allowed for damages, which in Massachusetts was formerly 10 per cent, as stated in the case of *Grimshaw* v. *Bender*, and 20 per cent in New York and Pennsylvania, by statute.

By *St.* 1825, *c.* 177, of this Commonwealth, it is now settled, that bills on Europe, payable there but protested and sent back, shall be recovered against the drawer or indorser here,
266 with the current rate of exchange, and five per cent in addition thereto, with interest on the contents from the time when the same shall be refused acceptance or payment.

The ground upon which the original usage and the statute

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provisions have been adopted, is the great inconvenience and derangement of business which may occur, in consequence of the disappointment in regard to funds relied upon, where a bill is drawn upon a foreign country. The same reason does not apply to balances of accounts, and there is no case decided, in which any thing beyond the debt due and interest has been allowed in a suit commenced here by a foreign merchant, except one in the Circuit Court of the United States for Pennsylvania, which will be presently cited and remarked upon.

The question came before the court in New York, in the case of *Martin* v. *Franklin*, 4 Johns. R. 125. The suit was by an English merchant for the price of goods purchased in England by a merchant of New York the defendant. It was determined that he could recover only the amount due at the par of exchange. And the same principle was decided in another case, *Scofield* v. *Day*, 20 Johns. R. 102.

The only case which has been cited or which can be found, where the current rate of exchange was allowed in making up the judgment, except on bills of exchange, is in 2 Washington's Cir. Ct. Rep. 167 ; but this is a case of very little authority, as the point was not started in argument, and was settled by the court suddenly without advancing any reason in support of it.

In England, where the custom of merchants has introduced this principle into the law, it is not applied to the acceptor of a bill who has refused to pay ; because his contract is only to pay the bill according to the face of it ; but it is applied to drawers and indorsers, because they undertake that the bill shall be paid, and that they will indemnify the holder. *Napier* v. *Schneider*, 12 East, 420. Now the liability of a debtor on a balance of account, is not greater than that of an acceptor of a bill ; nor has the creditor suffered the disappointment from the failure to remit, which the holder of a bill does at not finding funds in the country and in the hands to which he has been directed for them.

In the case of *Martin* v. *Franklin* above cited, the court 267
give the true reasons why a debt sued in this country by a foreign merchant is not to be increased by the rate of exchange. They say, " The debt is to be paid according to the par, and

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not the rate of exchange. It is recoverable and payable here to the plaintiffs or their agent; the courts are not to inquire into the disposition of the debt, after it reaches the hands of the agent. He may remit the debt to his principal in bills, or he may invest it here, or transmit it to some other part of the United States, or to other countries. We cannot trace the disposition which is to take place, nor award special damages upon such uncertain calculations. All that the plaintiffs can ask, is their debt, justly liquidated and paid, in the lawful currency of the United States."

We subscribe to this doctrine, and are satisfied, that when the suit is brought in this Commonwealth by a foreign creditor, or by his creditor who sues here on the trustee process, the judgment can be only for the amount due at the par value of lawful money for sterling.

Whether the trustee is liable in this suit for interest on the balance in his hands, is the second question in this case. The Court have stated it to be their opinion, that he was chargeable with interest; but it having been suggested by one of his counsel, that on a former argument he was stopped upon this point, from which he inferred that the Court were with him, and being satisfied that such an intimation was given, we thought proper to revise the decision and to receive an argument in writing; which has since been given to us, and has had due consideration. We however see no cause to revoke the decision.

It appears by the answer of the trustee, that an interest account was kept with him by Williams, and that he should have felt himself obliged to pay interest had he settled with Williams. It also appears, that when summoned as trustee, he did not set apart or deposit the amount of the balance due, but kept it mixed with his own funds, so that it formed part of his trading capital.

The first and principal objection to the allowance of interest is, that on the service of the trustee procees, the fund is locked up in the hands of the trustee, so that he is prevented by law
268 from paying the debt, and is not at liberty to make any use of the fund; so that the payment of interest, either to the princi-

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pal defendant or the attaching creditor, would be oppressive and unjust.

The basis of the argument is undoubtedly sound, and if the fact corresponds with the legal supposition, the conclusion would be unavoidable. But if this locking up of the fund is merely a fiction, the trustee in truth making use of it all the time the matter is in suspense, to allow him the benefit of the principle would be to adopt the shadow for the substance.

Primâ facie, the service of the trustee writ stays the property in the hands of the trustee, and the law considers that it remains *in statu quo* until the judgment; but if it appears by the answer, that the money is in constant use, or so mixed up with his general funds as to form part of his trading capital, the reason of the rule ceases, and so the rule itself ought not to be applied. It is said, that for aught which appears, the use of the money may have been prejudicial to the trustee, for he may have lost by his trade or speculations; but the right to interest does not depend upon the *successful* use of money, but *merely* upon the *use* of it. He who uses it takes the risk of profit and loss.

To follow up the metaphor made use of by the trustee's counsel; the service of the writ turned the key upon the fund, but the trustee keeps the key, unlocks the chest, and takes the money into his own hands. In such case he cannot be allowed to say, "the fund was locked up and therefore I will pay nothing for the use of it." This is the reason of the thing, and there is no authority against it.

The only case which bears upon the subject, and *that* is very distinguishable from this, is *Prescott* v. *Parker*, 4 Mass. R. 170. The trustee had been indebted to the principal on a judgment recovered against him, which was satisfied by paying after-attaching creditors; so that he must have been discharged, unless he were liable for interest on the judgment; and it was determined he was not. The reason given is, that in the case of a judgment, interest is given only as damages for detention of the debt, and that as by the service of the trustee process he was restrained from paying, there could be no damages for detention.

The reason thus given suggests the important distinction be- 269

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tween that case and this; between cases in which interest is given by way of damages, and those in which it constitutes part of the debt; as contracts in which there is a promise to pay interest. In the former class it is obvious, that when one is summoned as trustee, he is in no fault for not paying, and as he made no agreement to pay interest, he ought not to be charged with it. In the latter, the interest is the debt, as much as the principal, and he ought to pay it, unless the use of the money has been actually prevented. The case before us is, in regard to interest, the same as if a promissory note had been given for the balance upon interest; for the defendant states that an interest account was kept, and if he had settled with Williams, he should have paid interest; it was therefore included in and a part of the contract.

But it is argued, that the creditor only attaches what is due at the time of the service of his writ; so that the trustee can be liable, on this process, for so much interest only as had previously accrued. But we think the attachment of the debt carries with it the interest, just as an increase of price or value of a chattel attached will be to the benefit of the attaching creditor, or the enhanced value of bank or other stock will be to his use. When indeed the debt bearing interest is attached, if instead of appropriating the sum due, the trustee uses it as before, he uses what by relation to the attachment may be considered as the creditor's and not the principal's money.

After viewing the subject on all sides, therefore, we are of opinion, that in this suit the trustee is answerable for interest on the balance of account, down to the time when the money was demanded on execution, the judgment on *scire facias* being restricted by the statute to the amount which ought to have been paid over on the first execution. *St.* 1794, *c.* 65, § 6.

Another question has arisen in this case, of some importance in practice, and which has not yet, to our knowledge, received a judicial determination in this Commonwealth. The trustee has reserved near 200 dollars to indemnify himself for the expenses of this and other suits, and we are called upon to decide whether he may lawfully retain this sum. There is no provision in the statute upon this subject. It gives costs to the
270 trustee when he shall discharge himself, provided he offer to

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make his disclosure the first term; but when charged as trustee, he has not this partial relief. On the one hand it seems hard that the trustee, brought into court to answer for the delinquency of another, should be obliged to sustain the expense which in most cases will unavoidably arise, with little or no prospect of reimbursement from the principal; for generally he will be unable to pay. But on the other hand, it must be obvious, that great inconvenience will follow from allowing such a deduction from the funds as will amount to an indemnity; for in many instances, such expenses would absorb all the funds; so that the attaching creditor would get nothing, and the funds of the principal would be consumed without paying his debt.

Besides, the litigated cases are, in point of interest, between the trustee himself and the attaching creditor; as where the trustee claims the goods or money as his own, in which case he ought to bear the expense; or between the attaching creditor and some other creditors claiming under the principal by assignment or otherwise; in which case the trustee, we think, may insist upon an indemnity, before he discloses the facts which will enable the assignee to set up his claim, or at least he may be made to bear the expense of litigation, and in such case there would be no propriety in diminishing the fund for the expenses of such litigation.

It may be observed, too, that in all cases of *scire facias* founded upon a supposed withholding of the funds, the fault is in the trustee; he causes the expense and ought to pay it. In the original process in this case, the question whether trustee or not was controverted between the plaintiff, who was an attaching creditor, and the assignees of Williams under the commission of bankruptcy. The assignees or creditors of Williams were the parties in interest. The trustee could not, we think, have been compelled to disclose the proceedings under that commission, without an offer of indemnity against the expense of the suit. And as to the *scire facias*, the questions are entirely between the trustee and the attaching creditor, whether he should be charged with the rate of exchange, interest, &c. the expense of which he cannot justly charge upon the fund.

It must be seen, therefore, that no general rule can be es- 271

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tablished, by which the trustee may indemnify himself out of the funds in his hands, for the expense he may be made liable to; and we think there is no discretion in the court to allow a deduction or not, according to the exigency of the particular case. We feel therefore constrained to refuse the allowance altogether, believing that the legislature, if it had intended such deductions should be made, would have enacted a specific measure therefor, in a statute which seems to have been well studied by those who framed it.

If it should be thought reasonable, that a trustee, who at the first term discloses effects or credits in his hands, should be entitled to indemnify himself for the charges and expenses of the suit, out of the funds, the legislature will probably make some suitable provision therefor. Mr. Dane, in his Abridgment, considers it a hard case upon the trustee, to be obliged to sustain these expenses, in cases where he is ready to pay or surrender what he has in his hands; and we think so too; but we do not think that we are vested with discretionary power in the subject.

Note. Judgment was rendered for the balance acknowledged by the trustee to be due to Williams, with interest thereon, at five per cent, to September 5th, 1828, deducting the sum paid over at that time upon the execution.

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DAVID R. POIGNAND *versus* EBENEZER SMITH.

In an action by the assignee of a mortgage to recover possession of the mortgaged premises, against a disseisor, the affidavit of his assignor is not admissible in evidence to prove the loss of the mortgage deed, for the assignor might be a witness in the case.

In such an action, if diligent search and inquiry are made for the mortgage deed, by the demandant, and it cannot be found, he may give a copy from the registry in evidence.

If the mortgage deed appears from the registered copy to be an indenture interchangeably signed and sealed, and the part belonging to the mortgagee is proved to be lost, in order to make the copy admissible, due diligence must be shown to ascertain whether any counterpart exists, and if it does, to obtain it to be used in the trial.

Where land is mortgaged, a person who by taking possession of it disseises the mortgager, disseises also the mortgagee, and so long as the disseisor is in possession, the deed of the mortgagee will not pass his, the mortgagee's, interest in the land.

Where a person, without title, took possession of land which was under mortgage, and built on parts of it a carpenter's shop and a blacksmith's shop, and the tenants of the carpenter's shop occasionally used parts of the lot adjacent to their shop, to spread their boards on, and the tenants of the blacksmith's shop used other parts of the lot to run carriages on, and put tires on wheels, it was *held*, that this was a disseisin of the mortgagee only for the part of the land covered by the shops.

THIS was a writ of entry to recover possession of a piece of land on the old mill-pond in Boston. The demandant counted on his own seisin. The tenant pleaded the general issue, which was joined, and also filed a prayer for an inquiry into the increased value of the land by improvements; and the demandant filed a prayer for an inquiry into the value of the land without the improvements. The writ was dated December 16, 1826.

At the trial, before *Wilde* J., the demandant gave in evidence a deed of the demanded premises from the Mill Pond Corporation to John Peck, dated March 30, 1810. He then stated, that the land was on March 31, 1810, mortgaged by Peck to Ruggles Whiting, to secure payment of a note of Peck for 3000 dollars, payable to Whiting in twelve months with interest, that the mortgage deed and note had been lost by Whiting, and that Whiting had assigned the debt and mort gaged land to the demandant by a separate deed dated February 13, 1825. In order to prove the loss of the mortgage

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and note, the demandant offered the affidavit of Whiting, who died before the trial, dated November 27, 1826. This affidavit was objected to by the tenant, but admitted by the judge. It appeared from this affidavit, that Whiting, being about to depart to the Western States in 1817, left the note and mortgage, with a large number of other papers, in a trunk or trunks in rooms hired by him in Boston, but that on searching for the mortgage and note on his return, he could not find them. Jacob Gates, a witness for the demandant, then testified that Whiting, in 1817, deposited a large quantity of papers in a trunk or trunks in the rooms, as he stated, and that Whiting, in 1823, examined the papers for the deed or note, and that he himself had also examined the papers for the deed and note, without success. Simeon S. Goodwin of Louisville, Kentucky, deposed that Whiting's papers in Kentucky had been left in his hands, and that the deed and note were not among them. James Richardson, Whiting's administrator, testified that he had examined all the papers of Whiting which were known to him, and that the deed and note were not among them. The certificate of the register of deeds for Suffolk, which was admitted by the parties, stated that it did not appear of record that the mortgage was discharged, either on the margin of the record or by deed, and that no assignment by Whiting or conveyance by Peck, of the land, subsequent to the mortgage, appeared on record, except Whiting's assignment to the demandant. The judge then permitted the demandant, the tenant objecting, to give in evidence a copy from the registry, of the mortgage deed; which purported to be an indenture between Whiting and Peck, dated March 31, 1810, mortgaging the land to Whiting, as before stated, and containing a power of sale by the mortgagee on non-payment of the debt. Only one part of the indenture was recorded; and it was proved that one of the witnesses to Peck's signature was dead, and that the other resided in Kentucky.

The demandant then produced an assignment of the mortgage and debt to him by Whiting, by deed dated February 13, 1825. It was proved that both of the witnesses to the assignment resided out of the State; and its execution was prov-

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ed by the deposition of one of them and proof of the handwriting of Whiting and the other witness.

The demandant then offered a deed of Whiting, dated April 19, 1825, in which he declared the intent of his former assignment, and corrected certain errors and omissions in the description of the land. The witnesses to this instrument were proved to reside out of the State; and the judge permitted it to be read to the jury, on proof of their handwriting, the tenant objecting.

The tenant did not prove any title in himself, but proved that before the assignment to the demandant, that is, in 1821 and 1822, he, the tenant, had erected upon part of the lot, a blacksmith's shop and a carpenter's shop, and had ever since been in possession of them, receiving rent; that the tenants of the carpenter's shop occasionally used parts of the lot adjacent to the shop, to spread their boards upon; and that the tenants of the blacksmith's shop used other parts of the lot, to run carriages on, and put tires on wheels. The tenant, upon this evidence, contended, that at the time of the assignment of the mortgage, the mortgagee was disseised, and that the assignment was therefore void. The demandant, on the other hand, contended, that until after an entry by the mortgagee, no such disseisin of him could take place, as to prevent the assignment of the mortgage and debt. The judge inclined to the opinion, that as to that part of the land on which the tenant had erected buildings prior to the assignment, or which was in his sole and exclusive possession, the demandant could not recover, but might as to the residue.

The tenant then offered evidence to prove, that more than six years before the date of the writ, he had caused dirt to be carted to several parts of the lot, and had paid for the same, and that he had used a part of the lot for floating timber on and landing the same; and there was evidence on the part of the demandant, that up to 1821 the whole lot was covered by the tide at high water, except the part on which the blacksmith's shop stood, and that up to October 12, 1821, the shop was occupied by one Roberts, who held the same as tenant of one Spear, Spear having entered on the lot and built the shop on it by mistake, instead of building upon the adjoining lot.

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Poignand v. Smith.

The demandant proved, that in 1819 the tenant, who was agent for the Mill Pond Corporation, exhibited a plan of the lot to one Jones, who was treating for the purchase of it of Spear, and that the tenant did not then claim the land, that up to October 12, 1821, when Roberts ceased to be the tenant of Spear and became the tenant of Smith, Smith had never, to the knowledge of Roberts, claimed the land; and that Smith, at the time that he floated timber on the lot in dispute, used the whole margin of the pond for eight rods for the same purpose.

The demandant contended, that the mere acts of carting earth upon the lot, and floating timber on it, did not constitute a possession which would entitle the tenant to betterments; and further, that the jury ought to be instructed, if they found for the tenant, to deduct the rents received by him from the value of the improvements.

The case was taken from the jury by consent; and if in the opinion of the Court the demandant was entitled to recover the land, or any part of it, the tenant was to be defaulted, and judgment to be entered accordingly; otherwise a new trial was to be granted. And if the Court should be of opinion, that the tenant could maintain any claim for betterments, then the value of the betterments and the value of the land were to be referred to auditors, if they could be agreed on by the parties, otherwise to be submitted to a jury.

March 10th. *Shaw* and *Bartlett*, for the demandant, contended that there was sufficient proof of the loss of the indenture, to justify the introduction of the copy from the registry. *Tayloe* v. *Riggs*, 1 Peters's Sup. Ct. R. 591; *Davis* v. *Spooner*, 3 Pick. 284; [2d edit. 286, note 1;] *Taunton Bank* v. *Richardson*, 5 Pick. 436; *Turnipseed* v. *Freeman*, 2 M'Cord, 269.

Probably not more than one part of the indenture was ever made; and even if another part were in existence, the demandant could not use it, as it is not recorded, and he cannot compel Peck to put it on record. *St.* 1783, *c.* 37, § 4 *Pond* v. *Wetherbee*, 4 Pick. 312; *Waller* v. *Horsfall*, 1 Campb. 501. Besides, the demandant cannot be obliged to call on Peck for the counterpart. He is in Kentucky, beyond the process of the Court. *Sebree* v. *Dorr*, 9 Wheaton, 563.

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The demandant, however, was only bound to produce the deed to himself; the office copy of a previous deed not in his possession, is sufficient evidence. 1 Stark. Ev. 368, *in notis*; 1 Stark. Ev. 366; *Doe* v. *Roe*, 1 Johns. Cas. 402; *Baker* v. *Preston*, Gilmer, 235; *Turner* v. *Stip*, 1 Wash. 319; *Carroll* v. *Llewellin*, 1 Harr. & M'Hen. 164; *Tebbs* v. *White*, 4 Bibb, 42. Where a witness is dead or out of the State, proof of his handwriting is admissible; but where a copy is admissible, it cannot be necessary to produce the witnesses to prove the execution, for the handwriting cannot be proved. 1 Stark. Ev. 337, 338. [*Eaton* v. *Campbell*, 7 Pick. 10.]

A mortgagee, before actual entry, cannot be disseised; his estate under our statute is different from that of a mortgagee in England. Powell on Mortg. by Rand, 157, note A, 166 *a*, 252; *The King* v. *St. Michael's*, 2 Doug. 630; *Eaton* v. *Whiting*, 3 Pick. 488; *Penniman* v. *Hollis*, 13 Mass. R. 429; *Snow* v. *Stevens*, 15 Mass. R. 280; *Groton* v. *Boxborough*, 6 Mass. R. 53; *Hatch* v. *Dwight*, 17 Mass. R. 299; *Willington* v. *Gale*, 7 Mass. R. 139; Anc. Charters, &c. 501; *St.* 1798, *c.* 77; *Scott* v. *Scholey*, 8 East, 467; *Wilder* v. *Houghton*, 1 Pick. 87; *Wells* v. *Prince*, 9 Mass. R. 508; Stearns on Real Actions, 242.

A disseisin cannot take place without some notice to the owner of the estate; in this case there is no evidence of such notice. Stearns on Real Actions, 5; *Pray* v. *Pierce*, 7 Mass R. 381.

The demandant, at all events, can recover all the land which has not been actually taken possession of by the tenant. *Kennebeck Purchase* v. *Springer*, 4 Mass. R. 416; *Green* v. *Liter*, 8 Cranch, 250; *Brimmer* v. *The Proprietors of Long Wharf*, 5 Pick. 135.

With regard to betterments, the carting of dirt on the land, and the floating of timber on it, were not acts of ownership. The demandant is entitled to have the rents and profits set off against the betterments. *Jones* v. *Carter*, 12 Mass. R. 314.

A. Townsend and *F. Dexter*, for the tenant, contended that the mortgagee never having been in actual possession of the land, it was not sufficient for the demandant, his assignee, to

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produce a copy of the mortgage deed from the registry; he was bound to produce the original. *Willington* v. *Gale*, 7 Mass. R. 138; *Portland Bank* v. *Hall*, 13 Mass. R. 207 · *Blanchard* v. *Colburn*, 16 Mass R. 345; *Wellington* v. *Gale*, 13 Mass. R. 483; *Smith* v. *Dyer*, ibid. 21. The demandant was bound to produce the best evidence of which the case admitted; this he has not done. 2 Stark. Ev. 483; *Pidge* v. *Tyler*, 4 Mass. R. 564; *Cunningham* v. *Tracy*, 1 Connect. R. 254; *Leyfield's case*, 10 Coke, 92. The assignment was not alone sufficient evidence of the existence of the mortgage, for this might have been discharged by payment of the debt or cancelling the deed. The mortgage deed belongs to the assignee and ought to be in his possession.

The evidence of the loss of the mortgage was not sufficient. 1 Stark. Ev. 355. The affidavit of Whiting, who was a competent witness, was inadmissible. But if the evidence of the loss were sufficient, this does not dispense with proof of the execution of the instrument. 1 Stark. Ev. 354. The demandant should have inquired of Peck for the counterpart, which was an original. 2 Bl. Comm. 296; 1 Stark. Ev. 354; *King* v. *Castleton*, 6 T. R. 236.

Smith being in possession at the time of the assignment, the mortgagee was disseised and nothing passed by the assignment, and the assignee can maintain no action. *Gould* v. *Newman*, 6 Mass. R. 241; *Poignand* v. *Smith*, 6 Pick. 172. The disseisin extended to the whole of the lot, for the evidence proves an actual possession and use of the whole lot by Smith and his tenants. *Boston Mill Corporation* v. *Bulfinch*, 6 Mass. R. 229.

The opinion of the Court was afterward drawn up by

PARKER C. J. There are several difficult points in this case, which have prevented us from deciding it so soon as we wished.

The first point relates to the proof of the loss of the mortgage deed from Peck to Whiting (which the demandant avers was assigned to him), so that a copy from the registry could be rightly admitted.

It was objected that the evidence to prove the loss was insufficient. The question was to be decided by the judge, in

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order to determine whether the copy should go in evidence to the jury. Taking the evidence altogether, viz. the affidavit of Ruggles Whiting, and the testimony of Gates, Richardson and Goodwin, the loss was sufficiently proved. But it is objected, that the affidavit of Whiting should not have been received, he being, as it is said, a competent witness, so that he ought to have been examined *vivâ voce* upon the stand, or his deposition should have been taken with the proper notice to the adverse party, or under a commission giving opportunity to cross-examine. We think this objection is sustained. The affidavit of a party on the question of loss of a paper may be admitted, to exclude any presumption that he may have it in his possession, or know where it is, but those who may be admitted as witnesses must testify in the usual form, in order that the advantage of cross-examination may be preserved.

But Whiting's testimony being out of the case, there is still a question whether there was not sufficient evidence of the loss. The demandant claims under an assignment by deed, separate and distinct from the mortgage deed, being an independent instrument referring to the mortgage. This assignment was made in February, 1825, several years after the supposed loss of the mortgage deed; so that this deed could not have been delivered over, but still was capable of being assigned, as the loss of the deed could not destroy Whiting's title. What remedy then can the plaintiff have, Whiting being now dead, and being dead at the time of the trial? The mortgage deed, after the assignment, belonged to the demandant. It is to him, therefore, we are to look for diligence in searching for it, and if he use due diligence, and it cannot be found, he is entitled to produce the registered copy, which is better evidence than proof of the contents by parol evidence.[1] He proves that Whiting, in 1823, made search in a trunk of papers which he had left in the custody of a friend, when he went to the western country. He proves that the person with whom Whiting's papers were so left, carefully searched among the deeds and papers in the trunk committed to his care; that

[1] See *Southerin* v. *Mendum*, 5 N. Hamp. R. 428; *Ward* v. *Fuller*, 15 Pick. 187; *Hewes* v. *Wiswell*, 8 Greenleaf, 94.

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the administrator of Whiting has searched, and also his agent in Kentucky, with whom he had also left papers; but neither deed nor note could be found. That there was in fact such a

279 deed, cannot be doubted, for the registered copy is sufficient evidence of this fact. This evidence leaves only the alternative, that the original mortgage deed was lost, or that it had been delivered up to the mortgager on satisfaction of the deb it was given to secure. We think this cannot be presumed against the evidence resulting from the record, which shows no cancelling of the deed, nor any release, one or other of which would appear, if the mortgage had been discharged.

But it appearing by the registered copy of the deed, that the original from which it was copied, was only one part of an indenture, which was interchangeably signed and sealed, a question is made, whether due diligence has been used without the production of the counterpart, or some proof of efforts to produce it. In the case of *The King* v. *Castleton*, 6 T. R. 236, it was decided, that proof of the loss of one part of an indenture, it appearing that the other part was in the hands of an agent who might be summoned to testify, was not sufficient to authorize the admission of evidence of the contents. The suggestion of the counsel for the demandant, that the counterpart, if existing, is in the hands of Peck, and that he is not a competent witness, differs this case from that, but not sufficiently to legalize the secondary evidence, for it may be that Peck, on application, will deliver this counterpart to the demandant, and if he will not and cannot be made a witness, still proof that he has been called upon and has refused, would put the demandant upon better ground than he now stands upon; for there may be a presumption, in the absence of the counterpart, and of all evidence of any attempt to procure it, that it contains some defeasance or discharge of the contract between the parties. We should not, therefore, feel at liberty to give full effect to the registered copy, without hearing something of the counterpart.

In regard to the deed of assignment from Whiting to the demandant, of February 13, 1825, that was sufficiently proved. And as to the deed of confirmation, it was considered by the judge as not necessary to the demandant's title; and

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so it strikes us. If it should be offered again, the proof of execution will be open to objection, as we have not decided that question, and perhaps unexceptionable evidence has been obtained.

In regard to the disseisin set up by the tenant with a view to prevent the operation of the deeds of assignment, we think the decision of the judge was correct, both as to evidence of disseisin, its limitation, and its effect upon so much of the land as was actually covered by the buildings then existing.[1] 280

THOMAS CURTIS *versus* EDWARD NORRIS and Trustee.

H having in his hands goods of N for sale, on which H had made advances, N requested him to pay out of the proceeds of the goods a bill drawn by N which had been dishonored, and to inform S & Co., who had accepted the bill for the honor of an indorser, of this request. H accordingly informed S & Co. of this request, and promised them verbally to pay the amount of the bill as soon as he should be in funds from the proceeds of the property. H having been summoned in foreign attachment, as the trustee of N, it was *held*, that S & Co. had acquired a claim against H for the funds in his hands, and that he was therefore chargeable as trustee of N, only for the balance in his hands after deducting his advances and the amount of the bill.

THE answers of John A. Haven, who was summoned as trustee, disclosed the following facts.

In the latter part of July, 1828, Haven received a quantity of molasses from Norris, the defendant, for sale on his account, on which Haven had advanced 2581 dollars before the service of the writ, which was on September 4, 1828. Some time in August, 1828, Norris informed Haven, that a bill which he, Norris, had drawn in the West Indies on Thomas Curtis and Isaac Hall for about 500 dollars, had been dishonored by them, and that William B. Swett & Co. had accepted for the honor of Alphonso Knight & Co. the first indorsers; Norris, therefore, requested Haven to call on Swett & Co. and inform them that he had property of Norris in his possession, and

[1] See *Hunt* v. *Hunt*, 14 Pick. 385; *Alden* v. *Gilmore*, 13 Maine R. (1 Shepley,) 178; *Kinsell* v. *Doggett*, 2 Fairfield, 314.

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also requested Haven to pay the amount of the bill out of the proceeds of the property, and to inform Swett & Co. of this request. The bill in question was accepted by Swett & Co. July 3, 1828. Haven accordingly soon after called on Swett & Co., and informed them of Norris's request, and engaged to pay the amount of the bill so soon as he should be in funds
281 from the proceeds of the molasses. Soon after, and three or four weeks, as Haven thinks, before the service of the plaintiff's writ, he called on Swett & Co. for the purpose of accepting the bill, but it was not in their possession. On the 4th of September, Tascar H. Swett, one of the firm of Swett & Co., called at Haven's store, and informed him that the bill was due on that day, which was the fact, and asked him to pay it. But Haven replied that the molasses was still on hand, and he could make no further advance in cash, but that he would take up the bill by giving his note payable in sixty days. Swett declined accepting this proposal, and afterwards on the same day paid the bill himself. Two hours after this, Haven was summoned in this suit. Swett & Co. on the same day, after paying the bill, had a writ made out against Norris as principal and Haven as trustee, but the writ in this case and another writ having been served on Haven before their writ could be served, they did not have it served.

Haven supposed the molasses to be worth about 1000 dollars more than he had advanced upon it.

The question for the Court was, whether the amount of the bill taken up by Swett & Co. as well as Haven's advances, should be deducted out of the funds in the hands of Haven, and he be chargeable as trustee for the balance only; or whether nothing should be deducted but his advances.

June 12th *Morey*, for the plaintiff, contended that the circumstances of the case did not show any acceptance of the bill by Haven, or any obligation from him to Swett & Co. which they could enforce. Swett & Co. did not think they had any claim against Haven; and whatever claim they might have had, was waived, by their suing out a trustee writ against him. *Smith* v. *Field*, 5 T. R. 403.

Nichols, for the trustee, cited *Hodgson* v. *Anderson*, 3 Barn. & Cressw. 842; *Adams* v. *Robinson*, 1 Pick. 461;

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Crocker v *Whitney*, 10 Mass. R. 316; *Mandeville* v. *Welsh*, 5 Wheat. 286; *Hall* v. *Marston*, 17 Mass. R. 575; *Farley* v. *Cleveland*, 4 Cowen, 432; *Jennings* v. *Webster*, 7 Cowen, 256.

The opinion of the Court was afterward drawn up by

PARKER C. J. According to the disclosure of Haven, he is at all events the trustee of Norris the defendant; and the question is, whether he is answerable for the whole balance 282 of the consignment to him, deducting his advances, commissions, &c.; or, whether there should be a further deduction for the amount of the bill drawn by Norris on Hall and Curtis, which being dishonored by them was accepted by Swett & Co. for the honor of Knight & Co., the first indorsers of the bill.

The question presented by the disclosure of the trustee is, whether the direction of Norris, the owner of the funds, to Haven his factor, communicated as it was to Swett & Co., was an assignment of so much of the funds to Swett & Co., as would discharge the bill accepted by them, or whether Haven had come under such obligation to Swett & Co. to take up the bill, as would give them a right of action against him for not performing this engagement. At the time of Norris's direction to Haven, he was equitably indebted to Swett & Co., they having accepted his bill, though not at his request, yet for his benefit and to preserve his credit as well as that of the indorsers. He was bound, morally, as well as by mercantile honor, to provide funds to meet that engagement. He discharged his duty by his direction to his factor. Nothing more was necessary to make the appropriation of the funds complete, than for Swett & Co. to have notice of it and to assent to it. This was done, Haven having given the notice and having expressly engaged to pay the bill from the funds thus appropriated. The assent of Swett & Co. must be presumed; for it was for their benefit, and they did not dissent, but on the contrary took no measures to secure themselves, or the friends for whose honor they accepted, relying for the due discharge of the bill, upon the direction of Norris and the engagement of Haven. Haven was liable to an action upon this promise, and

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the funds could have been recovered to indemnify Swett & Co.

It is said that all this passed without writing; but that is no objection, as the statute of frauds cannot apply to the case. In the case of *Crocker* v. *Whitney*, 10 Mass. R. 316, it is strongly intimated, that an assignment may be good without writing; and the case of *Hall* v. *Marston*, 17 Mass. R. 575, is of a similar character; and they are supported by the English cases. The principle of the decision in the case of *Van Staphorst* v. *Pearce*, 4 Mass. R. 258, is strongly in support of this position. A late case in England, *Hodgson* v. *Anderson*, 3 Barn. & Cressw. 842, is still stronger to the same point. It is therein expressly decided, that an assignment of a debt to pay a creditor, if assented to by the party owing, is valid though it be not in writing.[1]

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We think the acts of Swett, ignorant probably of his legal rights, do not bear upon the question in any other way, than as showing that he did not assent to the arrangement between Norris and Haven; but they fail to prove this, as he no doubt acted under a fear, that what had been done might be defeated by the processes of the other creditors.

Marvin Marcy *versus* Thomas Darling.

A building erected by an individual on land belonging to the government, he having no right in the soil, is, as between individuals, personal property.

So *held* in the case of a bathing-house erected on piles driven into the bed of a navigable river below low-water mark.

This was a bill to redeem an undivided moiety of a bathing-house situated on the northeasterly side of canal bridge. The house is erected on piers driven into the mud below low-water mark in Charles river. The bill alleges that the moiety in question was mortgaged by one Farnum to the defendant, and that the equity of redemption was taken and sold on execution and purchased by the plaintiff. The proceedings set forth are

[1] See *Collins* v. *Wescott*, 2 Fairfield, 193.

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according to the mode of levying on a right in equity to redeem real estate. Marcy v. Darling.

The defendant demurred to the bill, on the ground that the bathing-house was a personal chattel and not real estate, and that Farnum had no such right or interest as could be taken and sold on execution as stated in the bill.

Field and *B. Sumner*, in support of the demurrer, cited *Wells* v. *Banister*, 4 Mass. R. 514; *Doty* v. *Gorham*, 5 Pick. 487; *Badlam* v. *Tucker*, 1 Pick. 399. *June* 15th

F. Dexter and *Buttrick*, for the plaintiff.

The *Court* afterward expressed their opinion, that as it does not appear by the bill that the owner of the bathing-house had any right or interest in the soil or flats into which the piles were driven, on which the building stands, but that the same belonged to the public, the house was personal property and not real estate; so that the sale of the equity of redemption was wholly void.[1] 284

Bill dismissed.

BENJAMIN GRAY *versus* CHARLES BLANCHARD.

The demandant, being owner of a parcel of land with a dwellinghouse thereon, adjoining on the north to land with a dwellinghouse thereon belonging to his sister, facing to the south, conveys to the tenant's grantor in fee simple, "provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof." After the sister has conveyed her land to a stranger, the tenant mortgages by a deed reciting the foregoing provision, and afterward, while remaining in possession, makes windows in the north wall. *Held*, that the above clause was a condition, and not a covenant; that it was a valid condition; and that such breach of it worked a forfeiture of the estate, and gave the demandant a right to re-enter.

WRIT of entry sur disseisin to recover possession of a parcel of land and a dwellinghouse thereon, situate in Atkinson street, in Boston. Trial before *Wilde* J.

[1] See *Holbrook* v. *Baker*, 5 Greenleaf. 309; Story's Comm. on Bailments, (2d edit.) 238 and notes; *Wheeler* v. *M'Farland*, 10 Wendell, 318; *Ferguson* v. *Lee*, 9 Wendell, 258; *Pomeroy* v. *Smith*, 17 Pick. 85. See the provisions for attaching mortgaged personal estate, in Revised Stat. c 90, § 78, 79

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Gray v. Blanchard.

In 1801, the demandant owned a tract of land bounding easterly eighty feet on Atkinson street, and erected on the northern portion of it a dwellinghouse facing to the south with the eastern end fronting on the street.

In 1802, he conveyed to Willett and Bullard a part of the tract, bounded northerly by the parcel upon which he had erected the house, and measuring fifty feet on the street.

In March, 1803, he conveyed to his sister, Mrs. Haile Rand, the northerly part of the tract, describing it as bounded southerly by land of Willett and Bullard, and easterly on the street, there measuring thirty feet.

Willett and Bullard, having erected a dwellinghouse, under the directions of the demandant, on the northern part of the land sold to them, reconveyed such part to the demandant,
285 describing it as bounded east on the street, twenty-eight feet, west on land of Dorr, twenty-eight feet, and north on land of the demandant.

On the 28th of August, 1804, the demandant conveyed the tract now in question to William Blanchard, describing it as bounded east on the street, twenty-seven feet, south on land of Dillaway, west on land of Dorr, twenty-seven feet, and north on other land of the demandant, being part of the land purchased of Willett and Bullard; *habendum* in fee simple; "provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof, and also upon the condition, that no building shall be erected upon the strip of land at the east end of said house for the space of thirty years from the date hereof, but during said term said strip of land, measuring twenty-seven feet on Atkinson street, and three feet three inches in depth from said street, shall remain without any incumbrances except the fences as they now stand.

On the 24th of October, 1821, William Blanchard conveyed the same land to the tenant, "subject to the terms and conditions mentioned and contained in the original deed from said Benjamin Gray to said William Blanchard, reference being thereto had."

On November 1, 1821, the tenant mortgaged the land to

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Jonathan Amory, by a deed in which the conditions above quoted are recited at length. Gray v. Blanchard.

It was proved, that the house on the land in question, is a brick house of about forty feet in length and eighteen in width, the north wall being towards the house conveyed to Mrs. Rand, and that at the time of the conveyance to William Blanchard, the north wall was without any aperture except one door-way; and that in 1822 the tenant caused two windows to be made in this wall, which have ever since remained there.

The demandant proved an entry upon the demanded premises for breach of condition.

The tenant gave in evidence a deed of Mrs. Rand, dated in 1813, whereby she conveyed her land to George Blanchard, describing it as bounded southerly on land of William Blanchard. 286 But the demandant claims to be the owner of a strip of land one foot wide, lying between the demanded premises and the land conveyed by him to Mrs. Rand.

It was admitted that the demandant, at the time when he gave the deed to William Blanchard, had no interest in the house and land conveyed to Mrs. Rand, and has never since had any, and that none of his family have had any interest therein since his sister made the conveyance to George Blanchard.

The jury were instructed to find a verdict for the demandant; which was to be subject to the opinion of the Court.

Prescott and *Gorham*, for the tenant. The provision in the deed from the demandant to William Blanchard, considered as a condition, is void. 1. It is against the policy of the law, being idle and useless to the grantor and embarrassing to the grantee. In the case of a lease, the grantor owns the estate and may prescribe the mode of managing it; and if there is a forfeiture, the lessee ceases to pay rent; but here there is a barren condition annexed to a fee simple, in land in which the grantor has parted with his whole estate. 2. The condition is repugnant to the grant. It is a restraint on the fair and profitable use of the land, when no estate remains in the grantor. The condition is not annexed to a collateral thing, but to the estate itself which is the subject of the grant. Co. Lit. 223; ibid. 206 *b*; *Newkerk* v. *Newkerk*, 2 Caines's R. 345; *Sco-* *March 27th, 1827.*

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vell v. *Cabell*, Cro. Eliz. 107 ; *Stukely* v. *Butler*, Hob. 170 *Moore and Savil's case*, 2 Leon. 132 ; *Jervis* v. *Bruton*, 2 Vern. 251 ; 2 Bl. Com. 381 ; *Mildmay's case*, 6 Coke, 41 ; 5 Vin. 105, *Condition*, *A. a.*

But suppose the demandant had been, at the time of the grant and ever since, the owner of the adjoining estate and wished to benefit it, the Court will consider the provision in question as the grant of an easement by the grantee or a covenant, and not as a condition. On the breach of a condition, the grantor only and his heirs can enter ; and if he has assigned the adjoining land and then enters, he holds the estate discharged of the condition and the owner of the adjoining land derives no benefit from the condition. Lit. § 347 ; Co. Lit. 214 *a*, 214 *b*, 215 *b* ; Com. Dig. *Condition*, *A* 6 ; Bac. Abr. *Covenant*, *A* ; 2 Cruise's Dig. 6. Covenant will lie on a deed poll
287 accepted by the grantee. *Ewer* v. *Strickland*, Cro. Jac. 240 ; *Brett* v. *Cumberland*, ibid. 399, 521 ; *Knipe* v. *Palmer*, 2 Wils. 130 ; Co. Lit. 231. The clause may be bad as a condition, but good as a contract. *Freeman* v. *Freeman*, 2 Vern. 233 ; Shep. Touch. 368 ; *Holms* v. *Seller*, 3 Lev. 305. The only way of effecting the intent of the parties, is to construe it as a reservation or covenant, running with the land conveyed to Mrs. Rand. The party who took the deed could not have understood that the estate was to be defeated by the non-performance of the supposed condition, there being no words of re-entry, nor any words signifying that the deed would become void.

Putting in the windows was a trespass by a tenant at will, and ought not to work a forfeiture as against the mortgagee, who has the fee simple.

S. Hubbard and *C. G. Loring*, *contrà*, to the point, that the words used constitute a condition, cited Shep. Touch. 121, 122 ; Bac. Abr. *Condition*, *A*, *G* ; Vin. *Condition*, *H*, and notes ; Lit. § 328, 330, 331 ; *Jackson* v. *Allen*, 3 Cowen, 221. That the condition was not repugnant to the grant, Shep. Touch. 129, 131 ; *Large's case*, 2 Leon. 82, and 3 Leon. 182 ; Dyer, 318, *pl.* 12, Bac. Abr. *Condition*, *L* ; Vin. *Condition*, *Z*, *pl.* 4 and *pl.* 32 ; Com. Dig. *Condition*, *D* 6 ; *Doe* v. *Pearson*, 6 East. 173. That a court of equity will

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not relieve when the forfeiture is voluntary, *Rolfe* v. *Harris*, 2 Price, 210, note. That if the condition had been idle and useless, yet being express and upon a valuable consideration (the price of the land being of course less in consequence of the condition), it must be enforced, *Jackson* v. *Brownell*, 1 Johns. R. 267; *Skinner* v. *White*, 17 Johns. R. 357; *Wheeler* v. *Walker*, 2 Connect. R. 196; *King* v. *Withers*, Finch's Prec. 348. That the lapse of time since the breach of the condition, was not a waiver, *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Doe* v. *Allen*, 3 Taunt. 78; *Braddick* v. *Thompson*, 8 East, 344; *Roe* v. *Harrison*, 2 T. R. 425. That covenant would not lie, *Goodwin* v. *Gilbert*, 9 Mass. R. 510.

The opinion of the Court was delivered at this term, by

PARKER C. J. The tenant moves to have the verdict set aside, on several grounds.

First, because the words in the deed do not import a con- 288
dition, the breach of which will work a forfeiture of the estate, but only a covenant, entitling the demandant to his action for damages. But this is untenable. The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. The word "*provided*" alone, may constitute a condition, but here the very term is used which is often implied from the use of other terms. "*This conveyance is upon the condition*," can mean nothing more nor less, than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by converting conditions into covenants. It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether. No authority has been cited which bears out this suggestion; indeed the authorities are all against it

It is then said, that this condition is void, being idle and useless, and so against the policy of the law. But who shall judge over the head of the grantor, that this condition is idle and useless? At the time of his conveyance to William Blanchard, his sister owned, by conveyance from him, the next adjoining lot to the northward, with the front of her

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dwellinghouse towards this north wall. He probably intended to protect this estate from being overlooked from windows in that wall, the house in question having been built with this dead wall under his direction. This may have been important to the enjoyment and the value of his sister's estate; and there seems to be no good reason why, in disposing of the demanded premises, he should not provide for her accommodation. Those who hold under her may have considered this restriction on the estate as an inducement to purchase. The grantee was not surprised into the bargain, nor those who hold under him, the condition being inserted in all the deeds; and if the estate was of less value on account of this restriction, they were compensated in the price; at any rate, it was a voluntary bargain, and if they did not choose to take the estate *cum onere*, they should have rejected it altogether. Every proprietor of an estate has *jus disponendi*. He may grant it
289 with or without condition; and if he grants it upon condition directly, the estate of the grantee will terminate with the breach of the condition, if the grantor chooses to avail himself of the forfeiture and enter for the breach.

It is next argued, that this condition is void, as being repugnant to the grant, restraining the beneficial use of the estate. Without doubt, conditions of the nature supposed are void, and the estate is absolute; but the law very clearly defines this rule, and the cases cited to support this position show the limitation and the exceptions to the rule.[1]

A lease for two years, provided the lessee occupy but one; this is repugnant and senseless, and the proviso shall be rejected. *Scovell* v. *Cabell*, Cro. Eliz. 107.

Grant of a house upon condition not to meddle with the shops, the shops being part of the house; this is of the same nature. Hob. 170.

So a grant of land or rents in fee simple, upon condition that the grantee shall not alien, or that his widow shall not have dower; these conditions are void, as clearly repugnant to the grant; Shep. Touch. 129, 131; for it is of the essence of a

[1] See *Newkerk* v. *Newkerk*, 2 Caines's R. 345; *M'Williams* v. *Nisby*, 2 Serg. & Rawle, 513; *Stockton* v. *Turner*, 7 J. J. Marshall, (Ken.) 192; *Hawley* v. *Northampton*, 8 Mass. R. 37; *Lawrence* v. *Gifford*, 17 Pick. 366.

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fee simple estate, that it shall be alienable and subject to dower.

But if the condition be that the grantee shall not alien to particular persons, or within a reasonable limited period, these conditions shall stand, not being inconsistent with the nature of the estate granted. Co. Lit. 223.

If one make a feoffment in fee on condition that the feoffee shall retain the land for twenty years without interruption, it seems this is a good condition and not repugnant. Shep. Touch. 131. A feoffment in fee with a condition that the feoffee shall not enjoy the land or take the profits, or that his heirs shall not inherit it, or that the feoffee shall do no waste, or that his wife shall not be endowed; these are all repugnant and void. Shep. Touch. 131. And the same law is of a grant by deed of bargain and sale, for by our law this is an entire substitute for a feoffment.

But partial and temporary restrictions as to the use, may be consistent with the estate granted, and so may stand.

A condition in a deed of a house, that there shall be no 290
windows in it, or no passage in and out, or that the grantee should never occupy or sell it, would come within the rule and be void; but that there should be no door or window on one side or end, that it should not be sold for several years, or to a particular person, would fall within the exception to the rule, and form a valid condition.

Again, it is said that the demandant not owning any land adjoining he has no interest in the condition, and so cannot avail himself of the forfeiture. But it is not necessary, in order to make a condition valid, that the party creating it should have any beneficial interest in any other estate which may be usefully affected by the condition. He may have conveyed an adjoining estate for the benefit of which this condition was created. He may have received a greater price for that estate on account of this condition, and justice to others may require that he should exact its performance.

It is said to be a general rule, that when a man hath a thing, he may condition with it as he will. This however is subject to the foregoing rule. Shep. Touch. 118. And the condition cannot be reserved to a stranger, but by and to him who

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doth make the estate. Neither can it be granted over to another, except to and with the land or thing unto which it is annexed and incident. Ibid. 120.[1]

It seems to us that there are many things which may be provided for as conditions in a deed, which, though of small consideration in the view of a stranger, may be thought of great importance by the grantor. A man has a vacant lot in front of his dwellinghouse, which somebody is desirous to buy, and he is willing to sell, if thereby his light and air shall not be too much obstructed. May he not sell it under a condition, that no building shall be erected beyond a certain height, or within a certain distance from his house, or that the land shall not be used for the purposes of a tavern, or for any particular business which is likely to be noisy or troublesome, at least for a limited number of years? Who is prejudiced by such a condition? The purchaser and all who may claim under him have notice of the restriction, and if it diminishes the value of the land, they get their compensation in the price.

291 The common law does not so interfere with the right of disposing of estates; as appears from the authorities cited Neither is there any thing unreasonable in the particular condition of this deed. The tenant's house is built with its easterly end on the street, its front to the south. Such houses are usually provided with light from the front and the ends. This very house had stood many years without windows in the back wall. Certainly if it is a hard thing for the demandant to exact the forfeiture, it was a foolish thing in the tenant to give him the opportunity.

Then it is thought that the various conveyances under the original grantee of the demandant, William Blanchard, and the tenant, who has charged the land with a mortgage, may have destroyed this condition, or defeated the right of the demandant to enter for the breach of it. But the law is otherwise.

"The estates of both parties are so suspended by the condition, that neither of them alone can well make any estate or

[1] See *Jackson* v. *Topping*, 1 Wendell, 388; *Winn* v. *Cole*, Walker, 119; *Hayden* v. *Stoughton*, 5 Pick. 528; *Brigham* v. *Shattuck*, 10 Pick. 306; *Clapp* v. *Stoughton*, 10 Pick. 463; *Austin* v. *Cambridgeport Parish*, 21 Pick. 215.

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charge of or upon the land;" that is, free from the burden of he condition. For he that parteth "with the estate and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed." "And when the condition is broken or performed, &c. the whole estate shall be defeated and the whole estate of *the whole*, and not of some part onlv. shall be avoided, except by agreement the condition is limited to part." Shep. Touch. 120, 121.

The last point made in the argument for the tenant is, that there being no clause of re-entry for breach of condition in the deed, the provision is not strictly a condition going to the forfeiture of the estate, but may for this reason be construed into a covenant. But here again the law seems to be clear the other way.

A clause of re-entry is not necessary to make a condition. *Proviso*, *ita quod*, *sub conditione*, make the estate conditional. Com. Dig. *Condition*, *A* 2. Other words, such as *si*, *si contingat*, do not make a condition, which will work a for- 292
feiture, without clause of re-entry Lit. § 331; Shep. Touch. 121.

It has been suggested also, that as the proprietor of the estate next north of the wall, must have known of the placing windows there, and did not prohibit or complain of the act, his silence should be construed a waiver of the condition, so as to defeat the covenantor's right to re-enter. But there are two objections to this; first, that the then owner of the adjoining estate had no legal interest in that condition, and therefore could not waive it. His silence might result from a reliance that the demandant, under whom derivatively he held, would vindicate his own rights. Secondly, a mere indulgence is never to be construed into a waiver of a breach of condition;[1] and so are the authorities. If the windows had been made

[1] See *Jackson* v. *Crysler*, 1 Johns. Cas. 125; *Hutchenson* v. *M'Nutt*, 1 Hammond, 21; *Coon* v. *Brickett*, 2 N. Hamp. R. 163; *Willard* v. *Henry*, 2 N Hamp. R. 120; *Lawrence* v. *Gifford*, 17 Pick. 366.

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before the conveyance in mortgage by the tenant to Amory, the demandant knowing that the condition had been broken and having omitted to enter for breach, there would be a strong case in equity for an injunction from a court with competent jurisdiction on the subject; but the mortgage was made before the breach of condition. It has been strongly urged, that after the mortgage, Charles Blanchard was only tenant at the will of the mortgagee, and that his act, unauthorized by the mortgagee, could not work a forfeiture. But he was, to everybody but the mortgagee, tenant in fee; and remaining in possession with the consent of the mortgagee, his acts have the same effect as if he had not conveyed in mortgage. The mortgagee's estate was subject to the same condition, not only by virtue of the original deed from the demandant, but the condition was expressed also in his deed from the tenant; so that he should have dispossessed the tenant, if he would have avoided the effect of his acts.

We therefore see no ground on which, consistently with the rules of law, we can deny the demandant's claim. It is a harsh proceeding on his part, but it is according to his contract, which must be enforced, if he insists upon it.

Judgment according to verdict.

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CHARLES T. HILDRETH *et ux. versus* EPHRAIM L. ELIOT *et al.*

A voluntary settlement fairly made and without a power of revocation reserved in the deed of settlement, cannot be set aside upon the application of the settler.

A feme sole, about to be married, conveys real and personal estate to her father, his heirs and assigns, to be held in trust by him, and by any other trustee to be appointed by the judge of probate, for her separate use, without being liable to the debts or control of any husband she may have during the trust; the income to be paid her during her life, and the residue and remainder to be conveyed to such child or children, his or their heirs and assigns, as she shall leave. She marries, and her husband dying, she takes a second husband, by whom she has issue living. Her father dies leaving several children. The judge of probate refuses to appoint a new trustee. Upon a bill in equity by the husband and wife to set aside the settlement, it was *held*, that the trust estate did not merge in the legal, the equitable estate being only for her life, and she having the legal estate in a portion only of the property as tenant in common with the other children of the trustee; and it was decreed that a new trustee should be appointed.

BILL in equity. The plaintiffs allege, that by indentures dated September 30, 1817, between Elizabeth F. Hildreth, one of the plaintiffs, then sole, of the one part, and her father, Ephraim Eliot, now deceased, of the other part, it was recited, that she was the owner of certain real and personal estate and was desirous of securing the same, in the event of her marriage (which, as the plaintiffs aver, was then about to take place and afterward did take place with Daniel Dunton, who has since died), to her sole use and benefit: That for that purpose it was agreed, that the property "should be, and the same was thereby, granted unto said Ephraim to be held in trust by him, his heirs and assigns forever, for the separate use and benefit of said Elizabeth and her heirs, notwithstanding the coverture; that is to say, that the same should be so held by said Ephraim and by any other trustee who might be appointed in the manner therein provided, without being liable to the debts, incumbrances or control of any husband she might have during the existence of the trust; with powers of leasing and investing, &c. and that he should pay over all rents and income and also such portion of the principal as he, said Ephraim, should judge necessary for her convenience and support, unto said Elizabeth or to such person as she should in writing, without the intervention of any husband, appoint, for

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and during her natural life, that is to say, during the term for which said trust should continue, &c.; and after the decease of said Elizabeth, the residue and remainder &c. to convey unto such child or children, his and their heirs and assigns forever, as she should leave; and happening the death of said Ephraim, his heirs &c. should as soon as practicable make conveyances to transfer the real and personal estate unto such person as should be appointed trustee by the judge of probate for Suffolk county for the time being;" who was in that event authorized by the indentures to make the appointment: That Ephraim, the trustee, took possession of the property and continued to manage the same until his death: That after the death of Dunton, the plaintiffs intermarried, viz. on August 4, 1824, and have issue, one son: That Ephraim, the trustee, died and left nine children, who are the plaintiff Elizabeth, and the defendants: That he made a will and appointed Ephraim L. executor, who, as well as the other defendants, declines making an assignment of the trust property until a trustee shall be appointed, and that notwithstanding the power given by the indenture to the judge of probate to nominate a trustee, he has declined so to do: That the indentures were executed at the instance and intreaty of Ephraim the trustee, to guard against Dunton's intermeddling with or wasting the property, and that all the purposes for which the trust was created have been satisfied, and that the trust ought to be revoked and the property ought to be restored to Elizabeth in her absolute right, to be held by her and her heirs.

The bill prays that the defendants may be decreed to convey and deliver over the property to Elizabeth; or if the trust ought to be continued during her natural life, it asks for the appointment of a trustee.

The defendants, in their answer, state, that soon after the death of Ephraim the trustee, the executor presented a petition to the judge of probate, praying him to appoint a new trustee, in pursuance of the provisions of the indenture, but that the judge refused, on the ground that he had no jurisdiction in the matter. They insist that the trust is to continue during the natural life of Elizabeth, and they say that it is expressly provided in the indenture, that any trustee who shall

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be appointed, shall give bonds with sufficient sureties to the judge of probate for the faithful execution of the trust. They offer to convey and pay over the trust property, and they pray the Court to preserve the trust, and to appoint a new trustee, and to order that he give bonds in the mode provided in the indentures.

June 24th. 1828

Aylwin, for the plaintiffs, said the object of the trust was to secure the property from being wasted by the first husband; that a new trustee would be obliged to give bonds, and would demand a compensation for his services; and he contended, that as the legal interest in one ninth part of the estate had descended to the *cestui que trust*, the equitable title was merged in the legal. *Wade* v. *Paget*, 1 Bro. C. C. 363; *Goodwright* v. *Wells*, 2 Doug. 771. The Court will set aside a voluntary settlement, upon the application of the party by whom it was made. *Ward* v. *Lant*, Prec. in Ch. 182; *Ellison* v. *Ellison*, 6 Ves. 662; *Colman* v. *Sarrell*, 1 Ves. jun. 50; *Otley* v. *Manning*, 9 East, 59. The Court will not interfere to support a trust, the object of which has failed. *Croft* v. *Slee*, 4 Ves. 65; *Bold* v. *Corbett*, Prec. in Ch. 84. The trust was temporary and confidential, as appears by the provision that Ephraim Eliot should at his discretion pay over a portion of the principal. Since the trust cannot be carried into effect in the manner intended by the *cestui que trust*, the judge of probate refusing to appoint a trustee, the Court will not deny her the control over her own property.

Minot, *contrà*, referred, on the question of merger, to 2 Bl. Com. 172, Christian's note; *Silvester* v. *Wilson*, 2 T. R. 444; 1 Eq. Ca. Abr. 382; and to show that the Court will not set aside a voluntary settlement, unless it was fraudulent or to the injury of creditors, Cruise, *tit.* 32, *Deed*, *c.* 22, § 45; 1 Mad. Ch. Pr. (1st ed.) 222; *Villers* v. *Beaumont*, Vern. 100; *Boughton* v. *Boughton*, 1 Atk. 625; Atherley's Law of Marriage, 94, 127.

At this term the opinion of the Court was delivered by

Wilde J. The principal question raised by the bill and answer is, whether a voluntary settlement fairly made, and without power of revocation reserved in the deed of settle-

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ment, can be set aside by the settler, or by a court of equity on his application.

The affirmative is maintained in *Lord Ormond's case*, cited in 1 Vern. 101, but all the subsequent authorities are the other way. In the case of *Villers* v. *Beaumont et al.* 1 Vern. 100, the chancellor says, "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly; for if you would relieve in such a case, you must consequently establish the proposition, viz. that a man can make no voluntary disposition of his estate, but by his will only, which would be absurd." In the case of *Boughton* v. *Boughton*, 1 Atk. 625, the same doctrine is laid down So also in the case of *Clavering* v. *Clavering*, 2 Vern. 475; where it was said, that if a prior deed could be discharged because voluntary, by a subsequent deed voluntary also, then there would not be any necessity of inserting powers of revocation, according to the established mode of conveyancing.

In the case of *Worrall* v. *Jacob*, 3 Meriv. 270, where the cases are reviewed, it was decided, that a voluntary deed or settlement, once perfected, could not be revoked at pleasure, even though the maker had retained it in his own possession. And the same decision was made in the case of *Clavering* v. *Clavering*, before cited, and in the case of *Brookbank* v. *Brookbank*, 1 Eq. Ca. Abr. 168; and the same doctrine has been frequently recognised in other cases. And Sir *Joseph Jekyl* was so clear in the opinion, that a voluntary deed once perfected could not be revoked at pleasure, that he established the copy or counterpart of the first deed, though the original had been destroyed by the maker.

Indeed courts have gone so far as to refuse to relieve against a voluntary settlement, under such strong circumstances as where the settlement was made upon a mere stranger and the settler afterwards married and had children, and thereupon made a new settlement on himself, his wife and their issue. *Allen* v. *Arme*, 1 Vern. 365; *Myddleton* v. *Kenyon*, 2 Ves. jun. 391.

297 The cases cited by the plaintiffs' counsel are not inconsist

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ent with these decisions, and fail entirely to maintain the principle they contend for. All those cases refer to voluntary covenants or agreements, and not to settlements actually made; or to cases where settlements had been left incomplete, so as not to be binding in law. In all such cases courts of equity refuse to interfere and grant relief to mere volunteers. So courts of equity will set aside voluntary settlements, where any undue influence has been used; and such influence may be presumed from the subsisting relation between the parties; as in case of a voluntary settlement or gift by a ward in favor of his guardian, or by a child in favor of his parent But in the latter case a settlement is not to be set aside, merely from the circumstance that it was made under parental influence. To authorize a court of equity thus to interfere, something unfair or unreasonable must be made to appear, in the terms and effects of the settlement. Thus if a child, possessed of an estate in fee, should, by the persuasion and influence of his father, make a settlement reducing himself to a mere tenant for life, with remainder to his children, the settlement would be valid. Atherley's Law of Marriage, 363. In *Brown* v. *Carter*, 5 Ves. 862, Lord *Alvanley* asks, "What is there unreasonable in the settler tying himself up to an estate for life, and leaving it to his children? Perhaps," he adds, "under the circumstances of the case it would be better for him

In the case under consideration, there is certainly no color for the suggestion, that any undue influence was used by the father. No benefit was secured to him. The settlement was a reasonable and prudent provision for the security of the daughter and her children; and in urging the measure, the father only performed his duty as a careful and provident parent.

We are therefore of opinion, that the settlement is valid, and that on no principle are we authorized to set it aside.

As to the supposed merger of the equitable estate in the legal, we think it cannot be maintained by the facts admitted.

By the terms of the indenture, the wife has only an estate for life in the equity; the legal estate vested in the trustee, and was intended to be preserved during the life of the wife, 298

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for the benefit of her children. Besides, she has only a portion of the legal estate in common with the defendants, so that her legal and equitable estates are not commensurate and cannot coalesce. But if there were a merger of the equitable in the legal estate, then the aid of this Court as a court of equity would not be necessary, and the bill should be dismissed.

Thinking, however, as we do, that there is no merger of the equitable interest, we are bound to preserve the trust for the benefit of the children; and for that purpose a new trustee must be appointed, to whom a conveyance of the trust property will be decreed according to the prayer of the bill. And that part of the bill which prays for the setting aside of the settlement is dismissed.

WILLIAM LUPTON *versus* HENRY CUTTER *et al.* and Trustees.

Choses in action assigned, are not, in the hands of the assignee, goods, effects, or credits of the assignor, liable to the trustee process; even in case the assignee would be trustee after receiving money by means of the choses in action.

A debtor assigned goods and choses in action to assignees, for the benefit of such of his creditors as should become parties to the assignment. After some of the creditors had become parties, the assignees were summoned as trustees of the debtor; and it appeared from their answers, that when the writ was served on them, the goods were not sufficient to pay those creditors, though the proceeds of the whole funds, including the choses in action, would be more than sufficient. The Court refused to direct the trustees to pay the creditors who had signed, out of the proceeds of the choses in action in the first place, and thus leave a part of the goods to be held by the trustee process, and discharged the trustees.

THE answers of Ebenezer Chadwick and John A. Bacon, the supposed trustees, disclosed the following facts. By an indenture, dated December 19th, 1826, made between the defendants, Cutter and Brigham, then merchants under the firm of Henry Cutter & Co., of the first part, Chadwick and Bacon of the second part, and certain creditors of the defendants of the third part, the defendants assigned to Chadwick and Bacon goods and merchandise, book debts, promissory notes, and other choses in action, to a large amount, for the benefit of
299 the defendants' creditors. Certain debts enumerated in one

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schedule were to be first paid in full out of the proceeds of the assigned property; and if any surplus was left, it was to be appropriated *pro ratâ* to the payment of the debts enumerated in another schedule. Five months were allowed for creditors to become parties to the instrument; and all who became parties, discharged Cutter & Co. from their demands. On the day before the writ was served on the trustees, which was done December 20, 1826, the preferred creditors of the defendants, the aggregate amount of whose claims was 43,798 dollars, had become parties to the assignment. After the service of the writ, other creditors became parties to the assignment; and the total amount due to all the creditors who became parties, was 61,459 dollars. All the goods and merchandise assigned were sold by the trustees, after the service of the writ, and produced the sum of 20,331 dollars, which the trustees distributed ratably among the preferred creditors. Before their final answer, the trustees had received from the sale of the goods, and collected from the book debts, notes and other choses in action, the amount of 44,723 dollars; and they estimated the amount still to be received under the assignment, at about 10,000 dollars. At the time of their last answer, the trustees had in their hands 925 dollars more than sufficient to pay all the preferred debts, out of which sum were to be paid all the costs and charges incident to the assignment.

The case was argued, first orally, at March term 1828, and afterward in writing, by *Hubbard* and *Fletcher*, for the plaintiff, and *Bassett*, for the trustees.

Hubbard and *Fletcher*. The service of the writ created a lien on the goods in the hands of the trustees, which is to be preferred to that of creditors who subsequently became parties to the assignment. The trustees having in their hands funds more than sufficient to pay the creditors who had signed before the service of the writ, the surplus after paying those creditors must be held by this process. *Burlingame* v. *Bell*, 16 Mass. R. 320; *Hastings* v. *Baldwin*, 17 Mass. R. 557; *Widgery* v. *Haskell*, 5 Mass. R. 144; *Marston* v. *Coburn*, 17 Mass. R. 457; *Halsey* v. *Fairbanks*, 4 Mason, 206; *Ingraham* v. *Geyer*, 13 Mass. R. 146; *New England M. Ins. Co.* v.

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Chandler, 16 Mass. R. 275. The trustees had in their hands two funds, upon one of which (the goods) the plaintiff has security, and upon the other (the choses in action) he has not. The whole of both these funds not being needed to pay the creditors who had signed prior to the service of the writ, the Court ought to direct the trustees to apply, in the first place, the moneys received from the choses in action towards the payment of these creditors, and thus to leave a part of the attachable goods to be held in this process for the benefit of the plaintiff. This mode of marshalling the assets will do justice to both parties, the creditors who had signed the instrument, and the plaintiff. And this claim is in conformity with established principles of equity. For it is now settled, that where one creditor, A, has two funds for his security, and another, B, has only one of them, the court of chancery will compel A to resort first to the fund on which B has no lien, in order to give B the benefit of his security. *Aldrich* v. *Cooper*, 8 Ves. 382; in which the cases are examined. So it is held, that a mortgagee cannot prove his debt against the estate of his mortgager who becomes bankrupt, without first surrendering his mortgage for the general benefit of the estate. The same rule has been adopted in this State in relation to the estates of deceased insolvents. *Amory* v. *Francis*, 16 Mass. R. 308. No chancery jurisdiction is necessary in order to enable the Court to marshal the assets in the trustees' hands, for this is not a common law process, but a proceeding *in rem*. Indeed the same equitable principle has already been adopted here in a case somewhat analogous. The Court compelled executors applying for leave to sell real estate for the payment of the testator's debts, to sell the estate which descended to heirs, in preference to that which was specifically devised. *Hays* v. *Jackson*, 6 Mass. R. 149.

Bassett. It is settled that choses in action are not *goods*, *effects*, or *credits*, within the meaning of the statute. *Andrews* v. *Ludlow*, 5 Pick. 28. And the only ground on which the plaintiff can hope to prevail, is by having the debts of the creditors who signed before the attachment, paid in par out of the choses in action. But it is believed that the power of marshalling debts, assets and securities, which is exercised by

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the court of chancery in England, does not belong to this Court. This Court has not the powers which are requisite for the purpose; it has no process in this case by which to bring all the parties before it, the debtors of Cutter & Co. and such creditors of theirs as signed the assignment, all of whom are interested in the question; nor can it operate on all by injunctions and other compulsory process. The trustee process is a strictly legal process.

But admitting the authority of the Court, there is no equity in the claim of the plaintiff. The question is between him and other creditors of Cutter & Co., who have become parties to the assignment since the service of the writ. Is not the claim of these creditors who have released Cutter & Co., and have agreed to be paid ratably out of the assigned property, more equitable than that of the plaintiff, who is endeavouring to obtain payment of his debt in full and in preference to all others?

Suppose two lots of land to be attached by A, and one to be afterwards attached by B, and the other by C; A may levy his execution on either piece of land, which he pleases, and the Court will not interfere to prevent him, in order to assist B. The present case is precisely similar. There is no reason why the Court should interfere here to assist the plaintiff, and to defeat the creditors who became parties to the assignment. In equity, A, the creditor who has the lien on two funds, is not deprived of his right to resort to either, but chancery places B, the other creditor, who has a lien on only one, in A's place, if A has elected to resort first to B's security. Toller's Law of Executors, 420; *Clifton* v. *Burt*, 1 P. Wms. 678, note; *Aldrich* v. *Cooper*, 8 Ves. 385, 387; *Evertson* v. *Booth*, 19 Johns. R. 493.

The plaintiff has no right to insist that the assignees shall go on and collect the debts for his benefit; nor would it be the duty of the assignees to do so, for it would be in effect to apply the funds to a different purpose from that which the assignees were appointed to execute; to defeat, and not to accomplish the purpose of the indenture. *Borden* v. *Sumner*, 4 Pick. 265. If the trustees should refuse to collect the debts

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for the benefit of the plaintiff, the Court have no power and no process to compel them to do it.

To allow the claim advanced by the plaintiff, would be productive of great inconvenience, in cases of assignments, as it would lock up all the property from distribution, until it could be ascertained whether the attaching creditors were entitled to any part of it; which might not be ascertained for years, until the choses in action were collected. This would be impairing the rights of the creditors who sign previously to the attachment, for they are entitled to have the proceeds of the property distributed as fast as they are realized.

Nov. term, 1829.

PARKER C. J. drew up the opinion of the Court. The answers of the respondents have raised a question as yet not decided, on the effect of an attachment by the trustee process, where the funds in the hands of the supposed trustee consist partly of goods, wares and merchandise, and partly of choses in action, or debts due to the principal debtor. And it is a question of considerable importance and great influence upon the mercantile concerns of the community, and especially upon the effect of assignments by insolvent debtors, which, for want of a regular system of bankruptcy established by law, have become the ordinary mode of adjustment between creditor and debtor. The decision will also have an important bearing upon the attachment law of this Commonwealth, which, notwithstanding its liability to abuse and the many practical mischiefs which it produces, has not ceased to be upheld by the legislature and the community. Between the two systems which alone are recognised by our laws, it is difficult to perceive any ground of preference which ought to affect any question relative to the validity or operation of either. The common right of attachment gives to any single creditor whose demand is sufficiently large, without regard to the origin of his debt, the privilege of seizing and appropriating to his sole use all the effects of the insolvent, leaving all other creditors entirely without remedy, and by the same process all the debts due to the insolvent, except those secured by negotiable paper, may be sequestered for the same purpose.

The obvious injustice of this system in its application to the mercantile class of the community, has given rise to the once

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questionable but now well sanctioned practice of voluntary assignments, with a professed view to make a fair distribution of all the effects and credits of the insolvent among all his creditors in proportion to their several demands; and had this been the true character of these assignments, there could be no reasonable complaint if they should have entirely superseded the system of attachment. But daily experience must have satisfied all, that this privilege is almost constantly abused, in the preference given to creditors who are in no respect more meritorious than those who are postponed. Besides which, it opens a door to fraudulent indulgences to debtors, which it is exceedingly difficult and often impossible to detect and expose.

It is a necessary consequence of the existing state of the law of creditor and debtor, that this right of preference should exist; for until a lien is created by attachment, the debtor, however insolvent, has the sole right of disposing of his property for the payment or security of any *bonâ fide* debt, and even under the attachment law he can effect the same purpose by secret intimations to such of his creditors as he may feel disposed to prefer. We know of no way of effectually curing these evils but by a general bankrupt law, which it is in the power of Congress only to enact, or such an insolvent law as the legislature may constitutionally adopt.[1] We come to this question therefore without any bias towards one system or the other; and shall endeavour to decide it according to the true intent and meaning of the legislature, as expressed in the trustee law, and as drawn out and expounded by numerous judicial constructions of that law.

The subject of attachment or *arrestment* (to use an appropriate Scotch word) by this statute of 1794, c. 65, are "goods, effects, or credits so intrusted or deposited (by the debtor) in the hands of others, that the same cannot be attached by the ordinary process of law."

The words "goods and effects" require no explanation, but the word "credits" is of ambiguous meaning and therefore requires exposition. It might mean debts due from the trustee

[1] See *St.* 1838, *c.* 163.

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himself to the principal, or debts due from other persons, the evidence of which was deposited with or intrusted to the trustee. It has been determined to mean the former only, and this, because on examination of the several provisions of the law, it was manifest such was the intention of the legislature. On execution against the trustee, he pays over any money which he acknowledges to be due to the principal from himself, or he may expose such effects as he holds, that the same may be taken by the officer. Now choses in action cannot be taken and sold on execution, and therefore are not liable to attachment. This was determined distinctly in the case of *Perry* v. *Coates & Tr.* 9 Mass. R. 537, and before, in the case of *Maine F. and M. Ins. Co.* v. *Weeks & Tr.* 7 Mass. R. 438.[1]

Since these decisions there has been no attempt to charge a trustee on the ground only that he held bonds, notes, accounts or any other evidence intrusted to him of debts due to the principal.[2] The remedy for creditors in regard to such property, is to summon the debtors themselves, if the debts are not assigned, or the assignees after they have received the money, if the debts have been fraudulently assigned, or if the money is no longer wanted for the purposes of the assignment. It is very clear then, that where nothing is assigned but debts, the assignees cannot be charged as trustees until they have received something, and as their liability depends upon the state of things at the time the writ is served upon them, if they have not then received any thing, they must be discharged. They then owed the principal nothing, nor had they any goods, effects or credits of his, within the meaning of the law, in their hands. Thus if one creditor causes his writ to be served before any debt has been collected, and another afterwards, the latter will hold the proceeds ; as was decided in the case of *Frothingham* v. *Hayley & Tr.* 3 Mass. R. 68.

[1] See *Thompson* v. *Brown*, 17 Pick. 463; *Morrill* v *Brown*, 15 Pick. 173. Bank bills that belong specifically to the defendant, may be attached. *Spencer* v. *Blaisdell*, 4 N. Hamp. R. 198; Revised Stat. *c.* 97, § 21. Money in specie may be attached and taken on execution. *Sheldon* v. *Root*, 16 Pick. 567; Revised Stat. *c.* 97, § 20. See *Conant* v. *Bicknell*, 1 Chipman, 50; *Dubois* v. *Dubois*, 6 Cowen, 494.

[2] See *Gore* v. *Clisby*, *post*, 555; *Morrill* v *Brown*, 15 Pick. 173; *Rundlet* v. *Jordan*, 3 Greenleaf, 47; *Staples* v. *Staples*, 4 Greenleaf, 532.

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It is equally clear, that in the present case, had the respondents disclosed only the goods and merchandise as in their hands by virtue of the assignment, they could not be charged as trustees, for by the same disclosure it appears, that the demands of creditors who had become parties to the assignment, would much more than absorb the whole value of these goods.

So that in either case, of the respondents' having only the goods, or only the choses in action, they would be discharged of this process.

The plaintiff therefore rests his case upon the supposed right and duty of the Court so to mould this process as to oblige the assignees to pay the creditors, for whom they hold in trust, out 305
of the proceeds of the debts assigned to them, so as to relieve the goods, which were in their hands under the assignment, from the trust, and thus subject them to this process , by analogy to the principle of marshalling assets, which is known and practised in courts of equity, and which has been applied by this Court in a case which from its nature seemed to require peculiarly the adoption of so reasonable a doctrine.

The case referred to is *Hays et al.* v. *Jackson et al.*, which was a petition of the executors of Jackson for license to sell real estate to pay debts, under the statute authorizing that procedure. There being real estate specifically devised, a general devise of the residue to Mrs. Swan, and certain other real estate, which, being acquired after the making of the will, of course descended to the heirs general of the testator, the question was, which portion of the estate should be sold for the payment of the debts ; and the decree was founded upon the principle of marshalling the assets, as practised in the courts of chancery, consistently with the provisions of the will.

This was essentially a case of chancery jurisdiction, and partaking also of the nature of probate authority. It was not a suit at common law, but a proceeding on petition, and it was perfectly competent to the Court to adopt the rules and principles of a court of equity in deciding it. The case therefore does not form an authoritative precedent for cases at common law, or for cases arising under other statutes which are not strictly analogous.

We do not mean to say, however, that originally, in carry-

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ing into effect by judicial process the trustee statute, the Court might not have availed themselves of well settled principles of equity, for this also is a jurisdiction given by a particular statute, which in its objects and provisions is peculiar and not according to the course of the common law.

But we must now take the statute as it has been construed and expounded by numerous judicial decisions, and not engraft upon it any new powers which may be inconsistent with the system formed out of it, which is now known and acted upon in practice.

306 We are to consider what the law was supposed to be at the time when this process was commenced, and when the creditors executed the indenture, and not introduce a new principle which will materially affect the interests of the parties, unless it shall appear manifestly to belong to a fair construction of the statute, and is reconcilable with adjudications which have long been resorted to by the profession in practising upon it.

It has been perfectly well understood, that no one could be charged as trustee, because he held intrusted to him the evidence of a debt due to an insolvent debtor. If these respondents are charged, that principle will be virtually overturned. They would not be charged because they held goods, for those are protected by the assignment; they would be charged because of the choses in action which were assigned to them.

But it is said this is not so; they are charged because of the goods; and although there was a lien upon the goods, yet that will be discharged before the final adjudication, and then the process operates directly upon them. But is not this misapprehending the effect of the assignment and depriving it of the efficacy intended? By that instrument the goods are absolutely and indefeasibly transferred, and immediately on the execution of it, may be sold and the proceeds distributed among the creditors; but if they are taken by the trustee process, they are to be held for an indefinite period, until the debts are all collected; some of which may be due in other States, some disputed and in litigation; so that the creditors who executed the indenture in the faith of a speedy payment of at least a portion of their debts, may be postponed to a far distant day; for the trustee must hold the goods until they are called for on

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execution, and that cannot be until all the debts, or at least enough to satisfy the signing creditors, have been collected. This would exceedingly derange the course of proceedings under assignments, and would frequently occasion loss as well as delay. It would no doubt have a tendency to discourage debtors from stopping in their downhill career, and induce them still longer to prosecute a losing business; but whether that is desirable or not, it can be no motive for us to introduce a change into the law. The effects of the law of attachment and the law of assignment are now so well known, that the legislature alone is competent to authorize a change.

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There would be also a difficulty in adopting this system of marshalling assets, arising from the constitution of this Court, and its want of power to execute the system justly and beneficially. There is no control over the assignees, so that they may be compelled in a reasonable time to collect the debts; without which it cannot be ascertained whether they are to be charged as trustees or not. This argument is made light of by the counsel for the plaintiff, but it seems to us difficult to answer. Suppose the assignees, finding the purposes of the assignment are to be frustrated, should refuse to collect the debts; how are they to be compelled? There is no process by which the Court can do it. The assignor would not be likely to hasten them to do what will defeat the object of the assignment. The after-signing creditors will have no interest in the collection of funds in which they are not to share. Those creditors who signed before the attachment are interested in a speedy collection, because there are already funds enough to pay them, that are locked up until the whole are collected; but they have no means of compulsion, unless by the slow process of an action against the assignee for delay or negligence, which will serve but little to expedite payment to them. The Court may and necessarily must continue the trustee process until the debts are collected, but this will be to the great inconvenience of these creditors, besides incurring probably great loss upon the goods, which are to be kept on hand all the time and until the conclusion of the process.

It was probably owing to these and other inconveniences, that the position now contended for has not been heretofore

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advanced; and the tenor of the cases in our books, though there is no direct decision, having a strong bearing against it The case before cited of *Maine F. and M. Ins. Co.* v. *Weeks & Tr.* gave room for the doctrine, and yet it was not advanced or intimated by counsel or the Court. The person summoned as trustee of Weeks had goods and merchandise deposited with him as security for debt, and also a promissory note payable to Weeks, which was not necessary for the security of the creditor, the other fund being sufficient. It was held he was not trustee, because choses in action are not goods, effects or credits, within the meaning of the statute. It might have
308 been urged in that, as well as in this case, that the creditor had two funds, and that he ought to be made to collect the note, and then he would be trustee for the goods; but the thought occurred to no one.

The late case of *Andrews* v. *Ludlow & Tr.* was of a similar character. There were chattels in the hands of Chapman, the supposed trustee, and also claims and demands against persons who had the property of Ludlow in their hands. The Court discharged Chapman, because he had not actually received more than enough to satisfy the demands for which he held the property in trust, at the time of the service of the writ, though before the final answer there was a balance in his hands. There again, by delay until the demands were collected, the supposed trustee might have been chargeable, but no suggestion of the kind was made.[1]

This difficulty did not exist in the case of *Hays* v. *Jackson*, for the application was for the sale of land, and the Court having determined which portion of the real estate should be sold, the decree operated upon that part immediately, and license being granted, the land was sold, and so the decree was executed.

Considering therefore the intent of the legislature as expressed in the terms of the trustee act, the decisions of the Court in regard to choses in action, and the long practice under the statute, during which the principle now set up has not been advanced, we do not think ourselves authorized to adopt it.

[1] See *Tucker* v. *Clisby*, 12 Pick. 22; *Bissell* v. *Strong*, 9 Pick. 562.

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That our whole system in relation to insolvent debtors is bad and requires amendment, we certainly are not disposed to deny. That the attachment law, trustee process, and law of assignment, have been found liable to great abuse, in such manner as not to admit of correction by the judicial power, must be obvious to the whole profession, and to the public generally. We may therefore expect that a wise legislature, whose duty and inclination it ever will be to modify the laws and adapt them to the existing condition of the community, will ere long supply the proper remedy.

Trustees discharged.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM 1829 AT LENOX.

PRESENT

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

ERASTUS SACKETT *et al. versus* ELIZABETH SACKETT.

The statute of Gloucester, (6 *Edw.* 1, *c.* 5,) giving an action of waste against tenant for life, for the recovery of the place wasted and treble damages, has been adopted as a part of the law of this Commonwealth; though in respect to tenant in dower, it has been modified by our own statutes.

Two or more of several heirs having the reversion of land devised for life, may, by virtue of *St.* 1785, *c.* 62, § 3, bring an action of waste, without joining the others, a forfeiture of the land wasted being a consequence of sustaining the action against the tenant for life.

THIS was an action of *waste*. The declaration alleged, that Solomon Sackett died seised in fee simple of several parcels of land described, containing about 114 acres; that he left two brothers (Erastus and Joseph, the plaintiffs) and three sisters (Penelope, Candace and Terza) his heirs at law; that he devised to the defendant "the one half of his real estate, being the estate above described, and that she should have the use
310 and improvement of the other half of his real estate, being the real estate described as aforesaid, during her life, and that at

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ner decease, he devised the residue of his real estate, being the half last above mentioned, to be divided in equal shares among his brothers and sisters and their respective heirs; that by virtue of the said devise, the plaintiffs, as heirs of the said Solomon, became seised and entitled to two equal shares, being two fifth parts of the moiety of the said real estate, and that the said two equal shares will revert to them, to be by them held as of their own inheritance and in fee simple at the death of the said Elizabeth, which real estate is now held by them as tenants in common;" and that the defendant had caused or permitted certain waste, to the prejudice, loss and disinherison of the plaintiffs.

The tenant pleaded that she had not made any waste.

At May term 1828, before *Putnam* J., the defendant objected that the plaintiffs could not maintain this action, they being the owners of only two undivided fifth parts of the reversion, and contended that all the reversioners should join, to recover the damages; whereupon a nonsuit was ordered, subject to the opinion of the whole Court.

The case was argued at September term 1828, and afterward in writing.

Gold and *Porter* relied on *St.* 1785, *c.* 62, § 3, which provides, that "in actions of waste, ejectment or other real actions, where possession of the inheritance alleged to have descended is the object of the suit, the heirs may all, or any two or more of them, join therein," &c. The plaintiffs claim as heirs, not as devisees. *Parsons* v. *Winslow*, 6 Mass. R. 178; *Whitney* v. *Whitney*, 14 Mass. R. 88.

H. Hubbard, for the defendant, contended that in this Commonwealth, an action of waste by a reversioner or remainderman, against a tenant for life or years, cannot be sustained; except under *St.* 1783, *c.* 40, in the case of a tenant in dower. The statute of Gloucester, (6 *Edw.* 1, *c.* 5,) giving the place wasted and treble damages, has never been adopted here. This statute extends to all wastes, voluntary or involuntary, (Hargrave's note 377 to Co. Lit. 57 *a*,) and if adopted here, our law has all the rigor of that statute, unmitigated by 6 *Ann. c.* 31, exempting all persons from actions for accidental fire in any house, except in the case of special agreement between

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landlord and tenant. It is believed that an action of waste has never been brought in this Commonwealth, to recover the place wasted and treble damages; nor have we any need of the statute in question, because an action of the case in the nature of waste furnishes a remedy against every species of tenant, and in favor of every species of reversioner. Even in England the action of waste has fallen into almost total disuse; and *case* had begun to be brought there before the emigration of our ancestors. 2 Wms's Saund. 352 *a*, note. That the statute of Gloucester is not a part of our common law, is to be inferred from our statute provisions in relation to tenants in dower. A colonial law of 1641 (Anc. Charters, 99), provides that a widow endowed shall not commit or suffer waste. The provincial statute of 13 *Will.* 3, *c.* 9 (Anc. Charters, 359), contains the same prohibition, and provides further, that the tenant in dower "shall be liable to action for any strip or waste by her done, committed or suffered." The object of these acts was to give a remedy, not to mitigate an old one which might be too severe. The burden rests upon the plaintiffs to establish the affirmative proposition, that this action can be sustained. [See 3 Dane's Abr. 228 to 231, 235; and 9 Dane's Abr. 265.]

The nonsuit was rightly ordered on the ground of a misjoinder of parties. If the plaintiffs are devisees, they are not within *St.* 1785, *c.* 62, § 3, in any respect. If they are coheirs, the action of waste is given to them for their shares of the inheritance *expressly* claimed, and upon the ground of a disseisin of the ancestor. The declaration does not show any title to recover under this statute.

Porter, in reply, cited on the last point, *Rehoboth* v. *Hunt*, 1 Pick. 224; 2 Wms's Saund. 25 ', note 6.

Sept. 12th. PARKER C. J. delivered the opinion of the Court. The plaintiffs are heirs at law of the testator and claim as such, though it is somewhat inaccurately stated in the declaration, that they became seised as heirs at law by virtue of the devise; for the estate devised to them being the same as they would have taken by descent, the devise was inoperative. It was objected that the action was improperly brought by only two of the

312 heirs; but our statute of 1785, *c.* 62, allows some of the heirs

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to join without the rest, in actions of waste, ejectment or other real actions, where possession of the inheritance alleged to have descended is the object of the suit; and if the action of waste is sustained, a forfeiture of the land is one of the consequences.

But it is contended, that an action of waste does not lie in this Commonwealth against tenants for life, other than those whose tenancy is in dower; and the argument is, that by the ancient common law of England, such action did not lie against such tenants, but only by *St.* 6 *Edw.* 1, *c.* 5, called the statute of Gloucester, which statute, it is said, is not in force here, never having been adopted or practised upon in our courts of law before the adoption of our constitution.

The question thus presented is one of nicety, and is the more interesting from the contradictory opinions of two of our most learned jurists, as expressed in their valuable works lately given to the profession.

Mr. Dane, in his Abridgment, in the chapter which treats of waste, considers that the statute of Marlebridge, 52 *H.* 3, has been adopted, whereby an action of waste is given to the reversioner, in which he may recover damages for the waste done; but that the statute of Gloucester, according to which the place wasted is recovered, as well as treble damages, is not in force, never having been adopted. Mr. Jackson, in his treatise on real actions, considers that the consequences of waste here are the same as in England, except so far as our statute in relation to dower has made a difference; so that it must be his opinion, that the statute of Gloucester is in force here, it being only by that statute that the place wasted is forfeited and treble damages recovered.

It is quite important, therefore, that there should be a judicial decision of this contested question, as the profession will probably be divided between these two learned jurists, and some practical inconvenience may arise from the doubtful position in which the question stands.

It seems to be clear, that before the statute of Marlebridge, that is, by the ancient common law resting in tradition, or on some more ancient statute, or on some judicial decision, tenants for life, except those in dower, by the curtesy, or by 313

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guardianship, were liable to no action for waste. The reason given in the books, for the distinction between these two classes of freeholders, is, that the former hold under lease or contract, and that the party from whom he derives his estate might provide by covenant for a forfeiture, if he chose; whereas the latter come in by law, and the law therefore provides the security for the reversioner.

This reason is applicable to the case of a lessee for life; for it was probably not unusual for landlords to protect their estates from waste, by the introduction of covenants for reentry; but it seems to have no force in regard to the class of tenancies for life created by will, or by deed in the settlement of estates, which probably were numerous in ancient times. But whatever may have been the reason, it seems that it was thought that some security against waste and destruction by those who enjoyed the estate without having an interest in the inheritance, was needed, and therefore the statute of 52 *H.* 3, was passed, commonly called the statute of Marlebridge, in the year 1267; which provided, "that fermors, during their terms, shall not make waste, sale nor exile of house, woods and men, nor of any thing belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

A few years' experience seems to have proved, that this lenient remedy against those who held freeholds or estates for years, was insufficient to secure such estates against depredations injurious to the inheritance, and probably it was seen that a remedy in damages did not afford indemnity to the reversioner; for many times it would happen, that he who committed or suffered the waste was unable to make the recompense. Those who enjoyed the temporary right would be eager to get the most profit at the least expense, and would be careless of the interests of those who came after them; and for these reasons, no doubt, the statute of 6 *Edw.* 1, called the statute of Gloucester, was enacted, only eleven years after the statute of Marlebridge, viz. in 1278.

314 This statute provides, "that a man from henceforth shall

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have a writ of waste in the chancery against him that holdeth by *law of England*, or otherwise for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste, shall leese the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at," &c.

The short interval between the two statutes will warrant the belief, that the frequency of waste and destruction by those who had no interest in the inheritance, by stripping the land of its valuable timber, suffering the buildings to become dilapidated, and other injuries, had excited the public attention, and called for the interposition of parliament, lest the reversioner should come to his estate without being able to enjoy it.

That tenants for life or years should be dispunishable for waste, as they were before the statute of Marlebridge, except as before mentioned, must have been felt as wrong and unjust throughout the land; and that statute having failed of curing the evil, the more rigorous provisions of the statute of Gloucester were found necessary, and probably produced the desired effect.

This then was the law of England as early as 1278, between three and four centuries before the settlement of this country, and it continued to be the law to the time of the emigration, and from that to the present time. It was a wholesome and necessary law, made for the preservation of estates against the depredations of those who had the power of injuring them, to the disherison of those who, being out of possession, had not the means of preventing the injury. The common law in regard to waste was thus altered and amended by statute, so that the antecedent common law was no longer in force, the same sanctions being extended towards tenants for life or years, who became such by grant, demise or devise, as before existed in relation to such tenants as came in by act of law, such as tenants in dower and by the curtesy.

Before the statute of Marlebridge, a lessee or devisee for life or years was dispunishable of waste, unless care was taken in the will or lease to make him so. After that statute, such tenants were punishable, unless the will or lease expressly excused them; upon the reasonable presumption, that no man 315

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who created such an estate, could intend that it should be destroyed by him to whom the temporary enjoyment had been granted, and that nothing but an express declaration should work such a wrong.

But estates were still wasted, and the recompense or indemnity was uncertain; perhaps the grievous amercement rendered the tenant unable to pay the reversioner. The statute of Gloucester then came, which created a forfeiture of the place wasted and of treble damages. Under this law our ancestors lived until their emigration; their progenitors had lived under it three centuries, having had their estates protected by it, and having been subject to its penalties if they had violated it. They then came to this country, bringing with them, as all agree, the rights and privileges of Englishmen, and the common law of that country, so far as it should be found applicable to their new state and condition. They brought with them also a charter, containing power to make such new laws as their exigencies might require. They could live under the old law or make new ones. Whenever they legislated upon any subject, their own law regulated them; when they did not legislate, the law they brought with them was the rule of conduct.

Then the question is, whether the law by which they would be governed in relation to waste committed by tenants, was the ancient common law, as it stood before the statute of Marlebridge, or as modified by that statute, or the law which was in force in England at the time of their emigration and for centuries before; and we think it very clear that it was the latter. It would seem exceedingly strange that their coming over to this country should operate as a repeal of either of those ancient statutes, so as to reinstate the law as it existed in the time of Henry 3, which had been abrogated three or four centuries, and was found inconvenient in the reign of that prince. And we can see no reason why they should be supposed to have adopted the statute of Marlebridge, and to have rejected the statute of Gloucester, both of which were enacted to alter and amend the common law. We think therefore, that unless our ancestors can be supposed to have settled this country, and

316 to have held real estate without any law to protect and pre-

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serve it, the law which was in force in the country which they had left, was their law, and remained so in regard to the descent, alienation, &c. of real property, and the remedies for injury to it, until they saw fit to supersede it by a law of their own making. And this was the opinion of the learned jurists and judges who lived before and after the adoption of our present constitution and had occasion to study the jurisprudence of both periods.

Thus Chief Justice *Dana*, in the case *Commonwealth* v. *Leach et al.* 1 Mass. R. 61, says, "the term *common law* ought not to be construed so strictly as is contended for. Generally when an English statute has been made in amendment of the common law of England, it is here to be considered *as part of our common law.*"

This proposition includes statutes of that description, whether enacted before or after the settlement of the colony, and was therefore too broad as a rule of our jurisprudence. Our ancestors having brought with them an ample charter for legislation, and having in fact exercised that power as soon as they were organized as a body politic, cannot be presumed to have adopted of course all the statutes which were afterwards passed in the British parliament, which might alter or amend the common law, but only such as they practically received into their system, and which in this manner became their common law.

The distinction between the two classes of statutes, those made before and those after the emigration, was seen and recognised by the Court in the case *Commonwealth* v. *Knowlton*, 2 Mass. R. 534. In the opinion of the Court, drawn up by *Parsons* C. J., though it does not bear his name, is the following sound exposition of the basis of our jurisprudence, as distinct from legislative enactments made since the present form of government has been in force.

"Our ancestors, when they came into this new world, claimed the common law as their birthright, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law, thus claimed, was the common law of their native country, as it was *amended or altered* by English statutes in force at the time of their emigration. Those statutes were never reënacted in this 317

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country, but were considered as incorporated into the common law.[1] Some *few other English statutes*, passed since the emigration, were adopted by our courts, and now have the authority of law, derived from long practice. To these may be added some ancient usages, originating probably from laws passed by the legislature of the colony of the Massachusetts Bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people."

"So much therefore of the common law of England as our ancestors brought with them, and of the statutes then in force, *amending* or *altering* it; such of the more recent statutes as have been since adopted in practice; and the ancient usages aforesaid, may be considered as forming the body of the common law of Massachusetts, which has submitted to some alterations by the acts of the provincial and State legislatures, and by the provisions of our constitution."

If the foregoing be a true enumeration of the materials which compose the common law by which our ancestors, under their colonial institutions, were governed, then it is very clear that the action of waste was the same and had the same consesequences with them, as it had in England under the statute of Gloucester, viz. forfeiture of the place wasted and treble damages. Nor does it in any way affect the argument, that no instance can be produced of such an action from the records; for it is known that the colonial records were but imperfectly preserved, and it may be that no occasion for the use of that action occurred in those times of simplicity and of crude administration of law, especially in regard to real property, which had hardly begun to be of value. Without doubt many principles of the common law have been brought into view and applied in later times, which, in the early period of our history, there was no occasion to use, as well as many forms of action, which, though now necessary, were then of no practical value. But the common law existing then as it does now, its copious

[1] See *Patterson* v. *Winn*, 5 Peters, 241; 1 Baldwin, 559; *Colley* v. *Merrill*, 6 Greenleaf, 55; *Boynton* v. *Rees*, 9 Pick. 532; *Sibley* v. *Williams*, 3 Gill & Johns. 62; *State* v. *Campbell*, Charlton, 167.

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fountain was resorted to for relief, as the exigencies of the rapidly increasing community required.

We admit the authority of the colonial legislature, while its charter continued, to have substituted any other remedy for waste than that which existed in England, or even to have made it dispunishable, as it was in regard to lessees for life or years before the statute of Marlebridge; but if they did not choose to legislate upon the subject, the common law, as above described, remained in force. We do not find that they passed any law upon the subject, except in relation to tenants in dower, and the brief and imperfect legislation upon that subject, upon a familiar principle of legal reasoning, gives strength to the position, that in regard to waste committed by other tenants for life, or lessees for years, they intended to leave the law as it was; *expressio unius*, &c.

But even in regard to tenants in dower we hardly think they intended to, or did abrogate, the common law. In 1641 they passed an act providing that widows should be entitled to their just thirds of the housing and land of their deceased husbands, and in the same statute declared she should not make strip or waste in the land of which she should be endowed; but they gave no sanction to this law, not even an action for damages. What can be inferred from this, but that the party aggrieved was to have recourse to his remedy at common law, to which same source also he was obliged to resort in order to show what acts would constitute waste? Upon the supposition, that the common law was not in force then, dowagers, as well as others, were dispunishable of waste, and the heir must take his inheritance just as the incumbents should choose to leave it, without power to prevent waste, or obtain a recompense for it.

The same reasoning applies with equal force to the act of 1701, passed by the provincial legislature, whose power to repeal the common law we also admit, subject to the restrictions of the provincial charter. By this statute the provision for dower was re-affirmed, and the mode of assigning and setting it out was prescribed, differing from the common law in some respects. This statute contained a similar prohibition against waste, and declared that the widow should "be liable to an action for any strip or waste by her done, committed or suffered."

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What action? We know not, unless such action or actions as the common law, as before described, had provided.

But the provincial legislature was also silent in regard to waste committed, &c. by other tenants for life, or tenants for years; so that unless the common law continued in force, they were still dispunishable. Now if it were admitted, that in regard to tenants in dower, the colonial or provincial act, or both of them, had repealed the common law and substituted an action on the case for damages only, the case of tenant for life or years, other than in dower, was left untouched, and if they were not amenable on the common law, the enormous consequence would follow, that they might waste and destroy *ad libitum*, without accountability. The only answer which can be given is, that they who gave them the estates should have provided in the contract against the evil. To this it may be replied, that in many cases, particularly those of confidence, as by will, such provision would not be thought of, and in all cases the law is the better security.

Mr. Dane, in his chapter on waste, is strongly of opinion, that the action does not lie in this Commonwealth, except against tenant in dower by virtue of the statute of 1783. His opinion is entitled to much weight on account of his great learning and experience, so that any who would question his positions ought to be well guarded and supported.

He does not call in question the principle, as laid down by those two great lawyers and judges, *Dana* and *Parsons*, that the English common law, as altered and amended by statutes at the time of the emigration, was the common law which our ancestors brought with them, but he thinks they silently rejected the statute of Gloucester because of its severity, supposing they adopted the remedial and rejected the penal part of it, or rather, that they adopted by legislation, in the colonial and provincial statutes, the principle of the statute of Marlebridge, which gave an action for damages. Neither the colonial nor provincial statute expressly gives an action for damages; the former merely prohibits waste, without suggesting any remedy; the latter gives an action for the strip or waste done, but does not state what shall be the effect of the action.

We do not see our way clear to adopt the inference which

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this learned author adopts, that an action on the case for waste is thus established as the only remedy; and if it were so in relation to a tenant in dower, we think it does not follow, for the reasons before given, that the doctrine reaches the case of other tenants for life or for years. For aught we know, the relaxation, if it was intended, was owing to a tenderness for the situation of widows, who generally would in those times have but a spare allowance, and who were much more likely to commit waste incautiously, ignorant of the restrictions upon the use of the property, than those to whom life estates would come from other sources.

Neither do we see that one part of the statutes should be called remedial and the other penal, or that the statute of Gloucester is more penal in its character than the statute of Marlebridge. They are both remedial in a high degree in regard to the preservation of estates, and preventing wrong and injustice by a dread of the consequences. A penal statute is one which provides a penalty or mulct for some offence of a public nature. The statute of Gloucester is not of that character. It merely gives effectual remedy for a private injury. The statute of 21 *Jac. c.* 12, gives double costs to an officer who is sued out of his own county. This is in some sense penal, and yet Chief Justice *Dana*, in the case of *Commonwealth* v. *Leach*, considers it to have been adopted.

But the argument for the defendant in this case has relied much on the provision introduced into our constitution, whereby it is declared, "that all the laws which have heretofore been adopted, used and approved in the province, colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution."

It is argued that the law respecting waste, as existing in England at the time of the emigration, was never adopted, used or approved in the province, colony or State, and therefore ceased to be the law after the adoption of the constitution, or rather never had force as law.

The answer to this argument has before been given, viz. that

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by that article of the constitution the common law was adopted as a whole, and that it is not necessary to show a use or practice of any particular branch of it, to give it validity; and that it is only of a statute enacted after the emigration that the question can arise, whether it has been actually used in practice, in order to give it the force of law. As an illustration, it may be stated, that many offences have been indicted as such at common law, since the adoption of the constitution, of which probably no example can be produced from the records of the colonial or provincial courts.

So also all the common law remedies for injuries done to property, real or personal, may be considered as legal remedies here, although in former times no case may have arisen which called for the use of any particular one; unless they are found to be repugnant to the principles of the constitution or inconsistent with the usages and the state and condition of the people, or unless superseded by some direct act of legislation.

And it is upon these grounds that the opinion has so commonly prevailed, that the action of waste, as practised in England at the time of the emigration, is part of our system of remedies, and that we find judges, and even the legislature, admitting by implication the existence of such a remedy.[1]

Nonsuit taken off and new trial granted.

Note. After delivering the foregoing opinion, the Chief Justice suggested, that as the defendant was tenant in fee of half the land described in the writ, it might be questioned whether the plaintiffs could sustain an action of waste, our statute of 1785, *c.* 62, § 1, having given a different remedy for waste by a tenant in common. See Jackson on Real Actions, 331.

[1] See *Smith* v *Follansbee*, 13 Maine R. (1 Shepley,) 273; *Sackett* v. *Sackett*, 5 Pick. 191; *Fay* v. *Brewer*, 3 Pick. (2d. edit.) 205, note 3. Nothing is now recoverable in such case but the place wasted and the amount of damages done to the premises. Revised Stat. *c.* 105, § 1.

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AMOS S. WARRING *versus* JOHN WILLIAMS.

Where an agreement, signed by three persons, was afterward altered by the consent of two of them, by adding seals to the names of the signers, and interlining the words "*jointly and severally*," and was afterward delivered by those two, it was *held*, that the alteration did not vitiate the instrument with regard to those two, but that they were bound by the instrument in its altered form.

A and B having been partners, A gave an obligation to B to indemnify B against a note on which C was promisor, C having become so merely as surety for A and B; C afterwards advanced money to B, with which B paid the note. *Held*, that A was liable to B on the obligation, for the amount of the note paid by B.

THIS was an action of *debt* upon an agreement declared on as being under seal and as made jointly and severally by the defendant and Elijah K. Williams and King Williams. The breach alleged was the non-payment of certain promissory notes due from the company of Warring & Williams to Sylvanus Foot, and a small debt due to Cyrus Williams, which notes and debt have been paid by the plaintiff.

The defendant pleaded *non est factum*, and that the plaintiff had been indemnified according to the tenor of the agreement. Issue was joined on these pleas. The case was tried before *Parker* C. J.

On the first issue, the positions taken by the defendant were, that the writing was not sealed when it was delivered, and that the words "jointly and severally" were interlined after the delivery, and without the knowledge or consent of the persons who signed the instrument.

Charles T. Williams, the subscribing witness, testified, that according to his impression, when he signed, only the names of John Williams and King Williams were on the instrument; that Elijah K. Williams was present, but had not then signed his name; that there were then no seals, nor any thing said about them; and that the words "*jointly and severally*" were not in the instrument. He also testified, that after signing his name, he left the room, the paper remaining on the table, not having been delivered; the plaintiff, with John and Elijah K Williams and Joseph Seelye, continuing in the room.

Elijah K. Williams, being released by the defendant, testified, that there were no seals on the instrument while he was present, and that the words "*jointly and severally*" were not

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in ; but that the plaintiff observed that the obligation ought to be joint and several, and wished the words to be inserted ; to which the witness did not object, or consent ; but the defendant did object, saying that he would consent to no alteration which would change the legal effect of the instrument.

It appeared that King Williams was not present at the meeting mentioned by the witnesses, but had previously signed his name in blank on the paper, before the instrument was drawn, with the intention to join the other parties, who were his brothers, in an indemnity to the plaintiff; no particular form having been agreed on.

The words interlined were proved to be in the handwriting of Charles G. Williams (a brother of the defendant), who drew the whole instrument.

Other evidence was in the case, some parts of it having a tendency to prove, and other parts to disprove, the contested facts of sealing and interlining before the delivery.

The jury were instructed, that if they believed from the evidence, connected with the appearance of the instrument itself, that seals were put to it and the words interlined before the final delivery to Warring, the first issue must be found for the plaintiff; that they might presume an authority from King Williams, who had signed in blank, to the co-obligors, to put a seal to his name ; but whether the instrument was King's deed or not, if they were satisfied that the seal affixed to the defendant's name was placed there by himself or by his consent, he being present, the issue ought to be found for the plaintiff ; that if the writing was altered, with the consent of any one of the signers, by adding seals, and interlining the words "*jointly and severally*," the obligation would be valid against the one thus consenting, although there was no evidence of the consent of the others.

In regard to the other issue, there was evidence to prove that the debts were actually paid by the plaintiff, but there was also evidence tending to show, that in paying the debt to Foot, he was the agent of Joseph Seelye, who had signed the notes held by Foot, and it was contended that Seelye had assumed that debt as part of the consideration for his purchase of certain property from Warring & Williams on the dissolution of

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their partnership. The jury were instructed, that if the plaintiff had paid the money on his own account, though he might have received the money from Seelye, he was entitled to recover. The defendant's counsel insisted, that as Seelye had signed the note to Foot, and so was obliged to pay that debt, if he advanced the money to Warring for the purpose of paying Foot, the payment should be considered as Seelye's, and therefore that the plaintiff could not recover; but the jury were instructed, that if they were satisfied that Seelye had not assumed that debt as part of the consideration of his purchase, but had only advanced the money to Warring to pay it, although Seelye was liable on the note, yet if, in point of fact, he was only surety for Warring & Williams, Warring, being liable to him, was entitled to recover. Warring v. Williams.

A verdict was found for the plaintiff on both issues; on which judgment was to be rendered, unless the ruling and opinions of the judge were wrong.

C. A. Dewey, for the defendant, contended that the alteration of the instrument with the consent of one obligor, without the consent of all, avoided it totally, even with regard to the one consenting. King Williams never consented to this alteration by adding the words "*jointly and severally.*" The alteration changed the nature of the obligation, and was of a kind to affect King Williams by making him severally liable for what he was only jointly liable before, and thus entirely vitiated the instrument. It is admitted that any obligor might insert an alteration which would affect himself only, but he cannot insert one which will affect another obligor. *Sept. 9th.*

He also insisted, that as Seelye, who was liable on the note to Foot, furnished the money to pay him, it was a payment by Seelye, and not by the plaintiff.

Dwight and *Jones*, *contrà*, as to the first point made by the defendant, cited Shep. Touch. 71; *Burgess* v. *Merrill*, 4 Taunt. 468; *Hartness* v. *Thompson*, 5 Johns. R. 160; *Woodward* v. *Newhall*, 1 Pick. 500; *Matthewson's case*, 5 Coke, 23.

PARKER C. J. delivered the opinion of the Court. The instrument produced by the plaintiff, to prove the issue on the plea of *non est factum*, purports to be a joint and several obli- *Sept 12th*

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gation of the defendant and two others, with a seal affixed to the name of each; but the words "*jointly and severally*" are not in the body of the deed, except by interlineation; and the subscribing witness testifies, that at the time of his subscription, these words were not contained in the instrument; nor were there any seals attached to it. The same witness and another testify, that at the time when the instrument was signed by the defendant, it was without seals and without interlineation. The burden of proof was then upon the plaintiff to show, that, before delivery to the plaintiff, the seals were affixed and the interlineations made;[1] otherwise the presumption would be, that the alteration was made by the plaintiff, and being material, the instrument would be void.

There were many circumstances relied upon by the plaintiff to satisfy the jury, that the instrument in its present form was delivered to him as the deed of the defendant and the other obligors. The witnesses who speak of the interlineation and the absence of seals were not present at the delivery. There was conversation about the necessity of making it a joint and several instrument; and the paper itself would justify the opinion, that seals were placed upon it after the signature and before the delivery. The evidence was sufficient to prove the fact, if the jury had a legal right to draw the inference. The instruction to them was, that if before the delivery, the words "*jointly and severally*" were inserted, and the seals affixed by either of the parties, or by their direction and consent, the party so consenting would be bound, and the instrument would be valid as his deed. The authorities cited in the argument

[1] See *Prevost* v. *Gratz*, Peters's Circ. C. R. 369; *Morris* v. *Vanderen*, 1 Dallas, 67; *Barrington* v. *Bank of Washington*, 14 Serg. & Rawle, 405; *Chesley* v. *Frost*, 1 N. Hamp. R. 145; *Jackson* v. *Jacoby*, 9 Cowen, 125; *Henman* v. *Dickinson*, 5 Bingh. 183; Bayley on Bills (Phil. & Sewall's 2d edit.) 90, 92; *Fowle* v. *Smith*, in Essex, 1836.

Whether the alteration was made before or after the execution of an instrument, and whether made with or without the assent of the adverse party, seem to be questions for the jury. *Cumberland Bank* v. *Hall*, 1 Halsted, 215; *Bailey* v. *Taylor*, 11 Connect. R. 531; *Heffelfinger* v. *Shute*, 16 Serg. & Rawle, 44; *Commissioners* v. *Hannion*, 1 Nott & M'Cord, 554. See *Jackson* v. *Osborn*, 2 Wendell, 555; *Emerson* v. *Murray*, 4 N. Hamp. R. 171; *Trowell* v. *Castle*, 1 Keb. 22.

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fully bear out this position, and we are satisfied that the instruction was right, and that the issue was rightfully found for the plaintiff.

In regard to the other issue, the ground taken by the defendant cannot be maintained, to wit, that as Seelye was answerable, on his note to Foot, for the debt which is the foundation of the plaintiff's claim to recover an indemnity, it was a payment by Seelye and not by the plaintiff. *Primâ facie* it would be; but it was competent for the plaintiff to show, that the debt was his own, and that Seelye was in truth only his surety; in which case, though Seelye advanced the money to him to 326
pay Foot, the plaintiff was paying his own debt, and was accountable to Seelye for the money. There was evidence to support this position, and it was for the jury to judge upon it. It is not contended that their verdict is against evidence, and the principle upon which it is founded is correct. The judgment must be according to the verdict.

Amos S. Warring *versus* King Williams.

If A signs his name on a paper in blank, and by parol authorizes B to write an agreement of a certain description over his name, he will be bound by such agreement when written over his name by B. But if B adds a seal to the name of A, and delivers the instrument as A's deed, A will not be bound.

This case was an action on the instrument mentioned in the preceding case. The facts were the same, with the following additional circumstances in relation to this defendant.

The defendant was not present when the instrument was executed and delivered by the other parties, nor during any part of the transactions relating to it, nor had he ever given any express authority or assent to have a seal annexed to his name. He put his name on the paper in blank, leaving it with his brothers to be filled up so as to constitute an indemnity to Warring, but without any agreement or direction as to the form of the instrument, and there was no evidence that he had ratified or confirmed it since its execution.

Dwight and *Jones*, for the plaintiff. A parol authority was *Sept.* 9th
sufficient to authorize the brothers of the defendant to write

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over his name such an agreement as he intended, and to put a seal to his name. Such agreements are usually under seal, and the substantial nature of the obligation is not changed by its being under seal. Shep. Touch. 57; *Ball* v. *Dunsterville*, 4 T. R. 313; *Smith* v. *Crooker*, 5 Mass R. 538; Com. Dig. *Fait*, *A* 2.

C. A. Dewey, *contrà*, said it was well settled, that a power to execute a sealed instrument can only be given by deed. Shep. Touch. 54; Co. Lit. 35 *b*, Hargrave's note 7; *Horsley* v. *Rush*, cited in *Harrison* v. *Jackson*, 7 T. R. 209; *White* v. *Cuyler*, 6 T. R. 177; Paley on Pr. & Agent, 133;

327 *Banorgee* v. *Hovey*, 5 Mass. R. 11; *Steiglitz* v. *Egginton*, 1 Holt's N. P. Rep. 141.

Sept. 12th. PARKER C. J. delivered the opinion of the Court. This case differs materially from the two preceding. The defendant was not present at the time of the delivery, nor during the transactions between the other parties to the instrument. And it is found, that he gave no express authority, nor any subsequent assent to the instrument in its present form as a deed. He had in the morning signed the paper in blank, on which the instrument was written, and had given it to his brothers, with the intention to be bound with them to indemnify. Any simple contract which might have been written over his name, would bind him; so that he cannot object to it, on the ground of its being joint and several. But there is a technical difficulty in holding him on this form of contract by deed. The general tenor of the books is, that an authority by deed is necessary to create an obligation by deed for another.[1]

The case of *Ball* v. *Dunsterville*, 4 T. R. 313, which is relied on by the plaintiff's counsel, is not sufficiently clear to sustain this position, as the party who denied the deed in that case was present when it was sealed for him, and it might therefore be considered to be his own act. The case of *Steiglitz* v. *Egginton*, 1 Holt's N. P. Rep. 141, is strong, perhaps too strong, in favor of the contrary position. We decide

[1] See *Reed* v. *Van. Ostrand*, 1 Wendell, 424; *Hanford* v. *M'Nair*, 9 Wendell, 54; *Blood* v. *Goodrich*, 9 Wendell, 68; *S. C.* 12 Wendell, 525; *Cooper* v. *Rankin*, 5 Binney, 613; *Gordon* v. *Bulkley*, 14 Serg. & Rawle, 331; *Berkley* v. *Hardy*, 5 Barn. & Cresw. 355.

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nothing more, than that it is necessary that the agent who affixes the seal, should have authority therefor; and that the signature in blank does not authorize any thing beyond a simple contract.[a]

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Plaintiff nonsuit.

Frederick Church *versus* Sally Burghardt.

Evidence of acts done and declarations made by the claimants of land, after a possession by one of them for thirty years, is admissible to show that such possession was not adverse.

Trespass *qu. cl. fr.* A verdict was found in favor of the plaintiff.

The parties were in possession of two adjoining lots of land, under different titles. The dividing line, which was first laid out in 1734, was a straight line. A crooked fence was erected more than fifty-eight years before the trial, and included on the Burghardt side a part of the other lot; but the owners of the two lots occupied respectively up to this fence for more than thirty years. The plaintiff recently erected a fence on the straight line, which the defendant tore down. 328

The question was, whether evidence of acts and declarations of the parties since the expiration of the thirty years, was admissible to show that the old fence was built for mutual accommodation, without any view to title, and that the occupation was not adverse.

Barnard and *Hall*, for the plaintiff, cited *Burrell* v. *Burrell*, 11 Mass. R. 298; Stearns, 38, 43, 67; *Smith* v. *Burtis*, 9 Johns. R. 174; *Brandt* v. *Ogden*, 1 Johns. R. 158; *Kincaird* v. *Scott*, 12 Johns. R. 368; Co. Lit. 374 *a*. Sept. 9th

Whiting and *C. A. Dewey*, for the defendant.

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[a] A paper signed and sealed in blank with verbal authority to fill it up, which is afterwards done, is void as to the party so signing &c., unless he afterwards deliver it, or acknowledge and adopt it. *Gilbert* v. *Anthony*, 1 Yerger, 69; *Wynne* v. *Governor*, id. 149; *Byers* v. *M'Lanahan*, 6 Gill & Johns. 250; *Perminter* v. *M'Daniel*, 1 Hill, 267; *Boyd* v. *Boyd*, 2 Nott & M'Cord, 125; *United States* v. *Nelson*, 2 Brock. 64; *Ayers* v. *Harness*, 1 Hammond, 368; *M'Ree* v. *Hicks*, 3 Dev. 379. But see *Wiley* v. *Moore*, 17 Serg. & Rawle, 438.

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Church v. Burghardt. Sept. 12th.

Per Curiam. It is urged that a complete possessory title was obtained, up to the line of the old fence; and that all evidence of acts or declarations, which took place afterward, are irrelevant and inadmissible to prove the character of the previous possession. If the premises are well founded, the argument is sound and the conclusion logical. But the very question was, as to the nature and character of that antecedent possession; and the acts and declarations of the parties owning the estates, made after thirty years, which had a tendency to show their motives and views during the thirty years, were proper to show the nature of the occupancy, and rebut the inference which would otherwise follow from the fact of possession. Surely, if a written agreement had been produced, showing that Burghardt was allowed to maintain a crooked fence, until Church should choose to have one back upon the true divisional line, it would defeat all claims to the land in dispute on account of the thirty years' possession. Confessions of the party in possession claiming under that title, his acts and declarations having a tendency to show such arrangement and understanding, are equally competent evidence.

Judgment according to verdict.

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HENRY B. BOYNTON *et al. versus* ISAAC M. REES.

Where a grant was made of a right to erect and maintain a dam from the grantee's land on one side of a stream, to the grantor's land on the other, at about the distance of sixty rods below certain mills of the grantor, and a dam was built more than sixty rods below, and afterwards, without any objection on the part of the grantor, was removed twenty rods higher up the stream, but was still below the sixty rods, such removal was presumed to be within the intent of the parties to the conveyance.

Held, also, that the grant was not invalid because no consideration was mentioned in the deed; and that to avoid it as a voluntary conveyance fraudulent as against subsequent purchasers, the party objecting to it must prove that no consideration was given.

The erection of the dam and the occupation of it six months in the year by the grantee, it being occupied the other six by a third person, were held not to be conclusive evidence of notice of the grant, as against a subsequent purchaser of the grantor's land.

A purchaser of land without notice of an incumbrance, may convey the same free of the incumbrance to a purchaser who has notice.

Where a witness who had assisted in erecting and maintaining a mill-dam, and had used it long enough to create the presumption of a grant of an easement in the stream, stated that his right was derived from a written agreement, it was *held*, that his testimony of the terms of the agreement was inadmissible, without evidence of the loss of the instrument, to prove the title to the easement.

THIS was trespass *qu. cl. fregit* for entering the plaintiffs' close and pulling up and tearing away his dam across Williams's River.

The defendant pleaded, 1. the general issue, which was joined: 2. that the *locus in quo*, which he described, was his soil and freehold, being on the west side of the river.

The plaintiffs replied to the second plea, that before the defendant had any estate, viz. August 21, 1794, Elijah Williams was seised of the land described in the plea, and on that day, by his deed, granted to John Newall junior the right to erect and maintain a dam across the river and over the close described; that Newall afterwards entered and built the dam, and conveyed the same to the plaintiffs; and then, by way of new assignment, alleged a trespass on the plaintiffs' land on the east side of the river.

In the rejoinder the defendant denied the seisin of the plaintiffs, and as to the new assignment, pleaded *not guilty*; and in a second plea to the new assignment, he averred a license from the plaintiffs.

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Boynton v. Rees

Issues were joined on these pleadings.

At the trial, before *Parker* C. J., the plaintiffs produced in evidence the deed of Elijah Williams to John Newall junior, dated June 30, 1794, of a lot of land on the east bank of the river, which deed was recorded September 15, 1795.

On August 21, 1794, Williams, by an indenture made between him and Newall, conveyed to Newall the right to build and maintain a dam across the river at about the distance of sixty rods below the mills and iron-works of Williams, and adjoining on one side of the river to land lately sold by Williams to Newall, on condition that the dam should not so raise the water as to obstruct the working of the mills or iron-works; and Newall covenanted for himself, his heirs, &c. and assigns, to observe the condition. No consideration is mentioned in the indenture.

The plaintiffs claim all the right acquired by Newall under these conveyances.

A dam was built across the river by Newall in 1794 and has been since maintained there by him and by those who claim under him, from 1794, except that it has been removed about twenty rods further up the river, but not so high as to be within sixty rods of the mill and iron-works mentioned in Williams's grant, and it has remained some years in the position it was in when the supposed trespass was committed.

The dam, however, was built at the joint expense of Newall and one Philander Rathbone, who had purchased of Williams a lot of land on the east side of the river next north of Newall's lot, and who had enjoyed by Williams's consent, without any deed, a small water privilege on the east side for working a fulling-mill.

Rathbone testified, that by agreement with Newall, he paid half the expense of building the dam, and that before he sold his interest, he kept one half of the dam in repair; that by his agreement with Newall, he had the right to the water from August or September 20th, every year, to March 1st, and that Newall had the same right the rest of the year; and that each had the exclusive right for their respective portions of the year, except when there might be more than sufficient water to carry on their respective rights. It appeared

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however, from Rathbone's testimony, that there was a written agreement between him and Newall. His evidence in relation to the agreement was objected to, because there was no sufficient proof that the written agreement was lost or destroyed; and the judge rejected his testimony in relation to the agreement, but allowed it so far as it related to his payment of half the cost of building the dam and repairing it, and to the use and occupation of it, as before stated.

It appeared that the dam had been occupied and kept up by several persons claiming under Rathbone by conveyances of the buildings used by him in the clothier's business, down to the time of the defendant's occupation.

The defendant claimed title to the land on the westerly bank of the river on which the western end of the dam was placed, under a deed, dated October 30th, 1803, of Elijah Williams, the original owner of the land on both sides, to Enoch W. Thayer, from whom the land came to the defendant by several mesne conveyances. The deed to Thayer and these mesne conveyances, did not mention the easement which had been granted to Newall. The defendant also claimed the privilege of the stream, and a right in the dam, by virtue of the agreement between Newall and Rathbone, and the occupation of the same as above stated.

In regard to the defendant's title by virtue of his land on the west bank of the river, the plaintiffs contended that it was subject to the privilege or easement acquired under the indenture of August 21, 1794, between Williams and Newall.

This indenture was not on record at the time of Williams's conveyance to Thayer; but there was evidence tending to show that Thayer at that time knew of this indenture. There was also direct evidence, that the defendant knew of the existence of the covenant in the indenture, when he purchased.

The judge considered the occupation of the dam by the plaintiffs and those under whom they claim, and the actual joining of the dam to the land on the western bank, as sufficient notice to all who claimed under Thayer, and that the covenant of Williams in the indenture, in regard to the use of the land for the dam, constituted a right against the subsequent purchasers, though the covenant was not registered.

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Boynton v. Rees.

All those who have owned the fulling-mill under Rathbone, have used the water only for the purpose of working that mill.

A nonsuit or default was to be entered, or a new trial to be granted, according to the opinion of the Court.

Sept. 9th. *Dwight* and *Porter*, for the plaintiffs.

Bishop and *Byington*, for the defendant.

Sept. 12th. PARKER C. J. delivered the opinion of the Court. This case cannot be decided, we think, without a trial by jury, in order to ascertain some facts in controversy, which are essential to a correct view of the case.

In the first place, as to the plaintiffs' title to the *locus in quo*, it depends first upon the conveyance by Williams to Newall, of the right to lodge his dam upon the west side of the stream. This instrument, we think, gave the right to fix the dam anywhere within the limits mentioned in the instrument; and the change of its original position, acquiesced in by the proprietors of the land, was justifiable, and will be presumed to be according to the intention of the parties to the conveyance. This settles one point.

We also think that the objection to the instrument, because no consideration is mentioned in it, is invalid. The deed itself imports a consideration, and to avoid it as a voluntary conveyance fraudulent against subsequent purchasers, the party objecting must prove that no consideration was given.[1]

But the difficulty in this part of the case with the plaintiffs, is the want of notice of the existence of this right in them, when subsequent *bonâ fide* purchasers took their conveyance of the land on the west side, after Thayer, against whom, personally, notice is sufficiently proved. Whether those to whom Thayer conveyed are to be charged with notice, is matter for the jury. The facts of the existence of the dam at the time of their purchases and of the occupation of it under Newall, are not of themselves notice; though with other facts which may be proved, they may be satisfactory evidence of notice. The fact, that the present defendant had direct notice when he purchased, is not conclusive against him,

[1] See *Jack* v. *Dougherty*, 3 Watts, 151; *Den* v. *Ogden*, 4 Wash. C. C. R. 139; *Briggs* v. *French*, 2 Sumner, 251; *Green* v. *Thomas*, 2 Fairfield, 318 Chitty on Contr. (4th Am. edit.) 4, note 2.

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according to the principle established in *Trull* v. *Bigelow*, 16 Mass. R. 406, which we believe to be approved law.[2]

The other branch of the case, which relates to the supposed right of the defendant under Rathbone to a tenancy in common with the plaintiffs, is also attended with difficulties, which can be removed only by a trial. Had Rathbone not stated, that whatever right he had, subsisted in a written agreement between him and Newall, the fact of his having aided in building the dam by paying for one half, and using it so long for his fulling-mill, would make it a fair case for the presumption of a grant. But there being such a writing, it ought to be produced, for it may so qualify Rathbone's right, as to destroy any claim now under him. At the trial, it did not appear that the paper was lost, or that any pains had been taken to procure it. On another trial, it may be produced by one party or the other, for it is certainly doubtful on which side it will be favorable; or the party seeking it may perhaps entitle himself to proof of the contents by Rathbone. Under these circumstances a trial must be had; which indeed was expected when the cause was opened the last time, it being taken from the jury, with a view to settle such questions of law as might arise out of controverted facts.

New trial granted.

[2] See 1 Story's Comm on Equity, 396, 415; *Hagthorp* v. *Hook*, 1 Gill & Johns. 270.

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AMOS H. WOODRUFF *versus* NATHAN HALSEY *et al*

A mortgagee of personal property mortgaged to secure a debt, may maintain trespass against a stranger, who takes it from the possession of the mortgager, although the trespass be committed before the debt becomes due

A mortgagee of a building standing, not on land of the mortgager, but on that of a third person, may maintain trespass against a stranger who pulls down and carries away the building, the building being unoccupied at the time of the trespass, and the mortgagee not having taken actual possession.

Trespass may be maintained against a person who carries away the materials of a building, which has been pulled down by a trespasser, though the person carrying them away was not engaged in the pulling down.

TRESPASS *quare clausum fregit*, for pulling down a blacksmith's shop belonging to the plaintiff, with counts for carrying away the materials.

The defendants, Halsey and Avery, severally pleaded the general issue, which was joined.

334 At the trial it was proved, that the defendant Halsey tore down the shop, and that the defendant Avery drove off a team loaded with part of the materials. The shop stood on land of one Crampton, having been built there under a lease from him. Henry S. Halsey, the brother of the defendant Halsey, on April 8, 1825, being then owner of the shop, and Emeline his wife, mortgaged to the plaintiff a small lot of land opposite to the shop and also by the same deed mortgaged the shop to the plaintiff, to secure a note for 169 dollars, payable in two years from that date. The shop was pulled down before the expiration of the two years, and there was no evidence of any entry into it by the plaintiff before it was pulled down.

Henry S. Halsey had absconded before the shop was pulled down, leaving his wife in possession of the premises, which he had agreed to convey to his brother, the defendant.

The defendant Avery was standing by, at some distance from the shop, with a team, while the defendant Halsey was pulling it down, but did not assist in taking it down. After Avery's team was loaded with the materials, and he was moving with it on the road, the plaintiff threatened to prosecute him if he did not carry it back. Avery however drove on with his load, and met one Fosket, to whom he said he did not know but he had got into trouble, and asked him what he should do. Fos-

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ket said he was going to get leave of the plaintiff to buy the materials of the defendant; and then went and asked the plaintiff if he had any objections to his purchasing; who said he had none, for he had been informed that he should have his remedy against the defendant. Fosket then told Avery he had bought the materials and Avery drove on his load. Woodruff v. Halsey.

The jury found a verdict against each of the defendants, assessing damages at seventy-five dollars against Nathan Halsey, and two dollars against Avery.

Judgment was to be entered on the verdict, or the plaintiff to become nonsuit, according to the opinion of the Court, or if the action should be supported against Halsey, and not against Avery, a verdict of not guilty was to be entered for Avery.

Dwight and *Bishop*, for the defendants, contended that the plaintiff, not being in possession, could not maintain trespass; and that the mortgager was the only person who could maintain trespass, while in possession. *Hitchcock* v. *Harrington*, 6 Johns. R. 290; *Runyan* v. *Mersereau*, 11 Johns. R. 534, *Hatch* v. *Dwight*, 17 Mass. R. 289. *Sept. 9th.* 335

No action lies against Avery, on account of the plaintiff's consent to the sale of the materials.

Porter, for the plaintiff. The plaintiff as mortgagee had the right of possession, and therefore may maintain trespass. *Putnam* v. *Wyley*, 8 Johns. R. 337; *Wheeler* v. *Train*, 3 Pick. 255; 1 Pow. Mortg. 18, 42 *a*, note, 157, 158, 159, 161; *Thunder* v. *Belcher*, 3 East, 449; Com. Dig. *Trespass*, *B* 2; *Newall* v. *Wright*, 3 Mass. R. 138; *Stowell* v. *Pike*, 2 Greenl. 387; *Smith* v. *Goodwin*, 2 Greenl. 173; *Starr* v. *Jackson*, 11 Mass. R. 519; *Fay* v. *Brewer*, 3 Pick. 203

The premises being vacant, the possession was in the plaintiff as mortgagee. *Wickham* v. *Freeman*, 12 Johns. R. 183; *Steward* v. *Lombe*, 1 Brod. & Bingh. 506; *West* v. *Skip*, 1 Ves. sen. 239.

PARKER C. J. delivered the opinion of the Court. In regard to personal property or chattels, the law is that trespass may be maintained by one who has the actual or constructive possession. Constructive possession is where the general owner, although the chattel is in the actual possession of another, has the right to reclaim it immediately, the person in possession *Sept. 12th*

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Woodruff v. Halsey.

not being entitled to retain it against his will. A strong case to illustrate this position is put in Bac. Abr. *Trespass*, *C*, 2. If the owner of a chattel, which is in York, gives it to J S. who is in London, and it is taken or injured by a stranger, J. S. may maintain trespass.

The blacksmith's shop, the subject of this suit, was mortgaged to the plaintiff to secure the payment of a debt in two years. We presume this mortgage to be valid against Henry S. Halsey the mortgager. The plaintiff, as mortgagee, had a right to the possession immediately. At the time the shop was pulled down, it was unoccupied, and therefore the possession was, according to the title, in the mortgagee. It is very clear that he had a right to an action of trespass for destroying it.[1]

As to the other defendant, he was a trespasser in taking away the materials; the trespass was complete, when he moved off with the lumber, and the right of action then vested. The subsequent transactions with Fosket could not amount to a release, accord or relinquishment.

[1] See *Lunt* v. *Brown*, 13 Maine R. (1 Shepley,) 236; *Phelps* v. *Willard*, 16 Pick. 32; 1 Chitty on Pl. (7th Am. edit.) 193, 194.

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JOSHUA WEST *versus* JOHN CHAMBERLIN.

Taking possession of a mortgaged estate for the purpose of foreclosure does not operate as a payment of the mortgage money; for the land still remains only a security for the money.

S having mortgaged an estate to W to secure the payment of several notes, W assigned the notes and mortgage to C, taking from C a written agreement with regard to one of the notes, which was for 500 dollars, that he, C, would pay 500 dollars to W as soon as it could be collected on the note of S. C received 30 dollars of S on account of this note, and took possession of the mortgaged premises for the purpose of foreclosure, and S occupied the estate for some time afterwards as tenant to C, but S, being insolvent, never paid C any thing for rent. — In an action brought by W against C on his contract before the three years for foreclosure had expired, the declaration also containing a count for money had and received, it was *held*, that the taking possession of the mortgaged premises did not amount to payment of the mortgage, and therefore that C was not liable on his contract; that C was not liable to pay the 30 dollars until the whole sum was collected, without notice from the plaintiff before bringing a suit for it; and that C, in this action, was not liable for rent which he had not actually received.

ASSUMPSIT on the following contract, dated October 1, 1824: — "For value received I promise to pay Joshua West or order five hundred dollars as soon as it can be collected on Allen Smith's note due 1 February, 1826, and interest. John Chamberlin."

One count upon this contract alleged that the money had been collected of Smith; another count was for money had and received.

The case was tried before *Parker* C. J.

It was proved that the defendant had received 30 dollars of Smith, which amount was indorsed on Smith's note.

The only other evidence in support of the first count arises out of the following facts. On May 23, 1823, Smith, who had purchased an estate of the plaintiff, for which he had given the note above mentioned and several other notes, mortgaged the estate to the plaintiff to secure the notes, and the plaintiff, on October 1, 1824, assigned the mortgage and notes to the defendant, who then gave the promise sued upon. The defendant, on June 7, 1826, brought a suit on the mortgage to foreclose, on which the conditional judgment was rendered in May, 1827, under which, by consent, the defendant entered and took possession in July of the last-mentioned year, and Smith then became tenant to the defendant.

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West v. Chamberlin.

It was insisted by the plaintiff's counsel, that the taking possession of the mortgaged estate by the defendant should be considered as payment of the note, so far as to make the defendant liable to the plaintiff on the contract in suit; but this was overruled.

It was also insisted, that the defendant must be considered as liable for the amount of the rent accruing from the time of his taking possession, until the estate was left by Smith; but this was also overruled, there being no evidence that Smith had paid any rent, and he being poor and embarrassed.

It appeared in evidence, that since the commencement of this action, the defendant had sold all his interest in the mortgaged estate, but the judge ruled that this evidence would not support the action.

The defendant, by direction of the judge, was defaulted, and judgment ordered to be entered for 30 dollars and interest; to which the defendant objected, on the ground that he was not liable for any partial collection of the note, without a previous demand.

The plaintiff moved for a new trial, on account of the ruling and opinion of the judge in regard to the effect of the proceedings under the mortgage.

The default was to be taken off, and the plaintiff to become nonsuit, or a new trial to be granted, or judgment to be entered on the default, according to the opinion of the Court.

Sept. 10th. *Dewey* and *Porter*, for the plaintiff, insisted that the defendant's taking possession of the mortgaged property amounted to a payment of the mortgage so far as to make him liable to the plaintiff on his contract. They cited *Amory* v. *Fairbanks*, 3 Mass. R. 562; *Newall* v. *Wright*, 3 Mass. R. 154; *Hatch* v. *White*, 2 Gallison, 152; *Omaly* v. *Swan*, 3 Mason, 474; 3 Pow. Mortg. 944, 945, 1001, 1006, notes; *Derby Bank* v. *Landon*, 3 Connect. R. 62.

The defendant, by taking possession, rendered himself accountable for the rent. He was to blame for letting the mortgaged premises to Smith, who was insolvent.

No notice or demand was necessary before bringing the action; it was the defendant's duty, when he received the 30 dollars, to pay that sum to the plaintiff, without waiting for any

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demand. Com. Dig. *Pleader*, C 69, C 75; *Brice* v. *Carre*, 1 Lev. 47; Hard. 42; *Lunt* v. *Padelford*, 10 Mass. R. 231.

Hubbard and *Marsh*, for the defendant. The cases cited on the other side are far from sustaining the position, that the entry of the defendant for the purpose of foreclosure amounts to payment; and to give such an effect to that act would be unreasonable. *Marshall* v. *Bryant*, 12 Mass. R. 321; *Hill* v. *Halford*, 2 Bos. & Pul. 413.

The plaintiff cannot recover on the money count, as the special contract is unrescinded. 2 Phil. Ev. 83; 2 Com. Contr. 19; *Robertson* v. *Lynch*, 18 Johns. R. 451. The defendant is not bound to pay any thing until the whole amount is collected. *Penoyer* v. *Hallett*, 15 Johns. R. 332; 10 East, (Am. ed.) 395, note; *Dorr* v. *New England Mar. Ins. Co.* 4 Mass. R. 231. And certainly he is not bound to pay every small sum which he may collect, until he is called on for it.

Per Curiam. We think it very clear that the suit and judgment on the mortgage, and the entry and possession under it, cannot be construed a payment of the debt by Smith to the mortgagee. The whole is but a process to compel payment, and is only equivalent to an entry to foreclose without a judgment. To consider it payment would be to compel the mortgagee to become a purchaser, when he might choose to hold the premises as a pledge or security for the debt. *Sept.* 12th

After foreclosure, the indefeasible title being in the mortgagee, the estate may be valued, and he may then be deemed to have received payment *pro tanto*. The cases cited are all of the latter sort, where the right of redemption is extinguished. Such must have been the case of *Amory* v. *Fairbanks*, which has been much relied on.[1]

In regard to the sum of 30 dollars, for which a verdict has been rendered for the plaintiff, we think that on a contract to pay a sum of money, when it should be collected out of certain funds, the promisor is not obliged to pay over every small sum as he shall collect it; certainly not without a demand. It must have been expected that the defendant should have time

[1] See *Hodge* v. *Holmes*, 10 Pick. 380; 1 Hilliard's Abr. 341, *et seq.* and cases cited; Revised Stat. c. 107, § 33.

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to collect the whole sum due to the plaintiff. There may be cases where only a part can be collected, and there it may be proper to pay it over; but this case is not of that kind.

Plaintiff nonsuit.

339 JOSEPH FARNUM *versus* ABIEL PLATT.

The owner of land having leased a marble quarry thereon for ten years, conveyed the land "reserving the use of the quarry until the expiration of the lease." The lease was cancelled within the ten years with the consent of the parties. *Held*, that the reservation was not thereby extinguished, but that it would continue in force till the end of the ten years.

Where one has a right of way over another's land, and the way is not defined, if the owner of the land stops up the way which is in use, the other party will be justified in going over another part of the land.

TRESPASS *quare clausum fregit* for breaking and entering several closes of the plaintiff, and carrying away marble from a quarry in one of the closes. The general issue was pleaded; also several pleas in bar, in which a right to enter upon the closes and do the several acts complained of, is averred and claimed under title derived from a sale on execution against one Eli Garlick.

At the trial, before *Parker* C. J., the following evidence was produced. On June 24, 1820, Garlick, who was then owner of the closes described in the writ, executed an agreement with William Middlebrook, David Dell, and Stephen Mead and sons, by which they were to have the use of the quarry for ten years, with the right of way through the closes for the purpose of going to the quarry and carrying away the marble; and the parties entered into and occupied the closes pursuant to the agreement. This agreement was not recorded. On September 14, 1822, Garlick, for a valuable consideration, conveyed the same closes to Farnum, the plaintiff, by a deed which contains the following clause;—"reserving also the use of the quarry on said Burhans lot until the expiration of the lease I have heretofore made to Stephen Mead and others," (meaning the agreement before referred to.) This agreement or lease was cancelled on October 5, 1822, by consent of the parties to it, and the names and seals torn off

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Garlick continued to use the quarry occasionally after the cancelling of the lease, under the reservation in the deed; and on November 26, 1826, his supposed right in the same was taken on execution and sold in due form to the defendant; and the acts complained of were the passing through the closes to the quarry mentioned in the reservation, for the purpose of 340 taking marble therefrom, and repassing through the same with loads of the marble to a mill where it was to be wrought.

It was insisted by the plaintiff's counsel, that even if the defendant had any right to enter on and pass over the land and take stone from the quarry, yet that he pursued a course different from the route which had been usual. But there was evidence that the plaintiff had fenced out the old road, and that the route taken was that which would do the least injury to the plaintiff's land.

A verdict was taken for the plaintiff; which was to be set aside, and the plaintiff nonsuited, if a right or interest remained in Garlick at the time of the sale on execution, which passed to the defendant; otherwise judgment was to be rendered on the verdict.

Hubbard and *Hubbell*, for the plaintiff. The reservation in Sept. 9th. Garlick's deed was only till the "expiration of the lease." When, therefore, the lease terminated by the agreement of the parties, though before the end of the ten years, all Garlick's right under the reservation ceased. Co. Lit. 47. The reservation was intended for the benefit, not of Garlick, but of his lessees. It was an exception from the grant in the deed, and when the estate of the lessees was extinguished, it was for the benefit of Farnum.

The cancelling could not operate as an assignment or surrender of the lease to Garlick. 4 Dane's Abr. 135.

The lease was void because it was not recorded. 4 Dane's Abr. 126; *Chapman* v. *Gray*, 15 Mass. R. 439; *Doe* v. *Butcher*, 1 Doug. 53.

The defendant was a trespasser in going out of the usual way; if that was stopped up by the plaintiff, the defendant's remedy was by action. *Comstock* v. *Van Deusen*, 5 Pick. 163.

C. A. Dewey and *Briggs*, for the defendant, as to the effect

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Farnum v. Platt.

of the reservation in the deed, cited *Bridge* v. *Wellington*, 1 Mass. R. 219; *Worthington* v. *Hylyer*, 4 Mass. R. 205, *Adams* v. *Frothingham*, 3 Mass. R. 352. As to the effect of cancelling the lease, they contended that it did not destroy the estate created by it, and cited *Matthewson's case*, 5 Coke, 23;
341 *Harrison* v. *Owen*, 1 Atk. 520; Gilb. Ev. 109; *Bolton* v. *Carlisle*, 2 H. Bl. 259; *St.* 1783, *c.* 37; *Roe* v. *York*, 6 East, 86; Cruise, *Deed*, *tit.* 32, *c.* 9; Touchstone, 74; Co. Lit. 225 *b*; *Hatch* v. *Hatch*, 9 Mass. R. 312; *Marshall* v. *Fisk*, 6 Mass. R. 24; 4 Dane, 110; *Commonwealth* v. *Dudley*, 10 Mass. R. 403.

Sept. 12*th*. PARKER C. J. delivered the opinion of the Court. The principal question in this case is upon the construction of a clause in the deed of Garlick to the plaintiff, which is in terms a reservation of the right to use a stone-quarry upon one of the lots described in the deed.

Before the execution of this deed, Garlick, then owner of the land, had leased the quarry, with the right of ingress and egress, to Middlebrook and others, for ten years then unexpired. The object of the reservation was to secure the rights of the lessees during the continuance of the lease; and the presumption of law is, that whatever diminution of value this occasioned to the title conveyed to the plaintiff, was accounted for in the consideration paid.

This lease, or agreement which had the effect of a lease, was, by consent of all the parties to it, cancelled after the execution and delivery of the deed to Farnum, and he contends that, on such cancellation, he held the land under the deed, free from the right secured by the reservation. We do not think this is the true construction of the reservation; but that its effect was to exclude from the operation of the grant, the use of the quarry by Farnum, during the time provided in the agreement for its continuance. This is the most natural construction, and such as was intended by the parties at the time. The words "until the expiration of the lease" mean, until it shall expire according to the terms of it, and not the termination of it by a new agreement between the parties to it. And the reservation enures to the use of the lessor as well as the lessee; for it saves the quarry from the operation of the deed, for

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the time, as much as it would, if the reservation had been for the unexpired time, without any mention of the lease. Therefore Garlick, or those lawfully holding under him, would not be liable in trespass, for taking stones from the quarry.

And as the way, used for access to the quarry, was not limited or defined, the shutting up the way commonly used gave the right to pass to and from, in any course least prejudicial to the owner of the land. This, according to the verdict of the jury, was done by the defendant in this case. 342

Plaintiff nonsuit.

DANIEL BARRETT *versus* MEDAD BARRETT.

A judgment in favor of the judge of probate in a suit upon a probate bond, brought in his name, for the benefit of a legatee, against an executor and his sureties, may be set off against a judgment recovered by the executor in his individual capacity against the legatee.

The Court, in their discretion, refused to set off the costs in such actions.

THIS was a motion on the part of Daniel Barrett to have the judgment in this action, which was upon a promissory note, set off against a judgment in an action brought in the name of the judge of probate, but (as appeared by an indorsement on the writ) for the benefit of Medad Barrett as a legatee, against Daniel and his sureties, on a bond given by Daniel as executor of the last will of Eleazer Barrett.

Bishop opposed the motion, on the ground that a set-off can be allowed only between the same parties and in the same capacities. He cited *St.* 1784, *c.* 29, § 12; 1793, *c.* 75, § 4; 1810, *c.* 84; *Simson* v. *Hart*, 14 Johns. R. 63; *Slipper* v. *Stidstone*, 5 T. R. 493; *Doe* v. *Darnton*, 3 East, 150; *Kinnerley* v. *Hossack*, 2 Taunt. 173; *Sherman* v. *Crosby*, 11 Johns. R. 70; 1 Dunlap's Pract. 481, 482, 483; *Duncan* v. *Lyon*, 3 Johns. Ch. R. 351; *Dale* v. *Fulton*, 4 Johns. Ch. R. 11; 5 Dane's Abr. 468. Sept. 1829.

Jones, *contrà*, cited Montagu on Set-off, 6, 9; *O'Connor* v. *Murphy*, 1 H. Bl. 657; *Schoole* v. *Noble*, ibid. 23; *Nunez* v. *Modigliani*, ibid. 217; *Mitchell* v. *Oldfield*, 4. T. R. 123; *Hathaway* v. *Russell*, 16 Mass. R. 473; *Battle* v.

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Barrett v. Barrett.

Sept. 12th.

Griffin, 5 Pick. 167 ; *Middleton* v. *Hill*, 1 Maule & Selw 240.

Per Curiam. The objection that the two actions are not in the same right, nor between the same parties, is grounded on mere matter of form. Daniel Barrett is answerable individu-

343 ally upon the bond, and the judge of probate is only a trustee for the person to be benefited by the action brought in his name.[1] The judgment is virtually just as if the action had been brought by Medad Barrett for the legacy. It is right therefore that the two judgments, so far as respects the debt or damages, should be set off.

But as to the costs, we think there ought not to be a set-off They may have been advanced by the attorney. This is a question addressed to the discretion of the Court.[2]

COMMONWEALTH *versus* THE COUNTY COMMISSIONERS OF BERKSHIRE.

A notice of a meeting of the commissioners of highways for the purpose of viewing the route of a highway, signed "By order of the commissioners, A. B., chairman," was held to be sufficient, notwithstanding the objection that it did not appear that the notice was issued at a meeting of three or more of the commissioners.

Where, upon a petition for the alteration of a "county road" (as it was called, though in fact it was a town road) or the location of a new road, between two other county roads, the commissioners of highways laid out a new road between the termini, it was *held*, that their describing the new road as an alteration, did not vitiate their proceedings.

Where the commissioners, after notice to all persons interested, viewed the route for a highway, and adjourned to a certain time and place for the purpose of locating the way and assessing the damages to individuals, it was *held*, that it was not necessary to give notice of the time and place so appointed.

WRIT of *certiorari* to the county commissioners.

At the Court of Sessions, in April, 1826, was presented the petition of M. Hendrix and others, representing that "the county road leading from the dwellinghouse of Levi Crittenden junior to the dwellinghouse of Cyprian Branch, in Richmond,

[1] See *Robinson* v. *Leavitt*, 7 N. Hamp. R. 77; *Gookin* v. *Hoit*, 3 N. Hamp R. 392.

[2] See *Chandler* v. *Drew*, 6 N. Hamp. 470; Revised Stat. *c.* 97, § 76

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is circuitous and hilly," and praying that court "to locate a county road from the dwellinghouse of Crittenden to the dwellinghouse of Branch, or make such alterations in the location of the present county road between said places as shall be considered necessary and proper."

This petition was transferred to the commissioners of highways by *St.* 1825, *c.* 171, and in a report signed "By order of the commissioners, George N. Briggs, Chairman," it was stated that the commissioners, "deeming it proper to view the 344
route prayed for in the petition," appointed the 18th of October, 1827, and the house of Crittenden, "the time and place when and where they would meet to proceed to view the said route, and having notified the selectmen and town clerk of the town of Richmond and all other persons interested, of the time, place and object of said meeting, by publishing the copy of said petition and the notice thereon which is hereto annexed, in the Pittsfield Sun, &c. the commissioners met at the house of Crittenden at the time aforesaid and proceeded to view the route aforesaid, and having viewed the same and heard all persons interested, they adjudged the alteration prayed for to be of common convenience and necessity. Whereupon the commissioners adjourned to meet again at the house of Branch on the day of November, 1827, at which time and place the commissioners met and proceeded to make, locate and establish the following alterations in the road aforesaid," (describing them.) Then follows an enumeration of the persons to whom damages were allowed.

The notice alluded to in the above report is directed "to the selectmen or town clerk of the town of Richmond, and to all persons interested in the foregoing petition," and states that the commissioners "have appointed the 18th of October, 1827, at 9 o'clock A. M. and the house of Crittenden," the time and place when and where they will meet to proceed to view the route mentioned in said petition; immediately after which view, they will hear the parties interested, at some convenient place. The notice was signed, "By order of the commissioners, George N. Briggs, chairman."

The foregoing report was returned to the county commis-

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Commonwealth v. County Commissioners of Berkshire.

sioners in April, 1828, and was accepted and the proposed alterations established.

The inhabitants of Richmond afterward applied to this Court for a writ of *certiorari*, alleging the following errors in the proceedings of the commissioners of highways:

1. Because it does not appear that the notice issued by the commissioners, of the time and place appointed to view the route, was issued at any meeting held by three or more of the commissioners upon reasonable notice previously given.

345 2. Because the road from Crittenden's to Branch's was not a county road but a town road.

3. & 4. Because no notice was ever given to the persons interested, of the time when and place where the commissioners met for the purpose of making, locating and establishing the alteration, and of estimating the damages to individuals and corporations.

5. & 6. Because it does not appear when and where the alteration was located and established and the assessment of damages made.

Sept. 10th. *Jones* and *Bishop* supported the petition. On the first error assigned, they referred to *St.* 1825, *c.* 171, § 2.

As to the second, they said the proceedings of the commissioners were void, having nothing to operate upon, there being no county road.

As to the third and fourth, they said that as no mode of locating a road and assessing damages is pointed out in the statute of 1825, the provisions of *St.* 1786, *c.* 67, § 4, should be pursued. The record states that the meeting was adjourned, but it does not say for what purpose; and it cannot be presumed that it was for the purpose of locating the road and assessing damages; and the notice given does not state that there would be a hearing on those subjects.

Hubbard and *Briggs*, for the respondents.

Sept. 12th. *Per Curiam.* The objection to the notice of the meeting of the commissioners cannot prevail.

The commissioners had no jurisdiction over a town way, but the imperfect description of the subject of their proceedings is not essential, if they had a right to act. It is admitted that there was a county road at each terminus, and the prayer was,

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that there should be an alteration of the road in question, which was called a county road, or that a new road should be located. The commissioners had a right to connect the two county roads, and that seems to be the effect of their doings, a straight road being made between the two termini.[1] Calling this an alteration of the old road, we think, ought not to vitiate the proceedings.

As to there being no notice of the location and assessment of damages; the commissioners went to view the route pursuant to notice given by them, and having adjudged the road to 346
be of common convenience and necessity, they adjourned to an appointed time and place for the purpose of locating it and assessing damages. As the location and assessment of damages were to be made by the same body which viewed and adjudged the road to be of common convenience and necessity, a new notice was not required.[1] The blank left in the record for the day to which the commissioners adjourned is a mere clerical omission, and may be filled up by the commissioners.

Proceedings affirmed.

SETH JENKINS *versus* MOSES HOPKINS.

The defendant, in 1799, conveyed to the plaintiff land in New York, with covenants of warranty and freedom from incumbrances. A judgment had been recovered in 1786 against the defendant's grantor, which constituted a lien on the land, and in 1801, upon a *scire facias* to revive the judgment, an execution was issued, by virtue of which the land was sold by the sheriff and a deed given by him to the purchaser. *Held*, that as the plaintiff's title was entirely defeated, there was a breach of the covenant against incumbrances, and that the damages were the amount of the consideration and interest.

The testimony of witnesses, that they were in possession of the land claiming title under a grantee of such purchaser, without proof of a conveyance by deed from such grantee, was held not to be sufficient evidence of an actual eviction under a paramount title, to authorize the plaintiff to recover on the covenant of warranty.

THIS was an action of covenant broken, upon a deed of bargain and sale, dated March 10, 1799, from the defendant to the plaintiff, of a parcel of land in Ontario county in the

[1] See *New Vineyard* v. *Somerset*, 15 Maine R. (3 Shepley,) 22.

[1] See Revised Stat. c. 24, § 6; *Rutland* v. *County Comm. of Worcester*, 20 Pick. 71.

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Jenkins v. Hopkins.

State of New York. The declaration avers a breach of the covenants of seisin, warranty and freedom from incumbrances, and sets forth specially, that John M'Kinstry, from whom the defendant derived his title, had previously, in 1786, suffered a judgment against him in the Supreme Court of New York, in favor of one Herrick.

At the trial it was contended by the plaintiff, that this judgment created a lien on all the real estate of M'Kinstry in New York, so that any conveyance by him, though without notice of the lien, would be void as against any levy or sale founded on such judgment, or any subsequent judgment obtained to
347 revive or enforce the same, notwithstanding such second judgment, and a sale in execution thereof, should be subsequent to the conveyance. The judgment against M'Kinstry remained unexecuted until 1800, when a process in the nature of *scire facias* was sued out against him, in virtue whereof an execution was issued, dated August 1, 1801, on which the sheriff of Ontario made a sale of the land in question and gave a deed thereof to one Dean. Copies of the proceedings of the court and sheriff in New York, were in the case. It did not appear by the sheriff's return, that he had advertised the time and place of sale with particularity, nor that he made the sale between the hour of nine in the morning and sunset, as prescribed by the statutes of New York.

There was no evidence that Dean entered on the land under his deed, but the plaintiff contended that the sale and deed gave him a seisin in fact and in law, so as to amount to an ouster and eviction of any person claiming under M'Kinstry by any conveyance subsequent to the first judgment. In 1807, Dean conveyed the land to one Williams. Several depositions were offered in evidence showing an entry and possession by persons claiming title from Williams, but no deed nor copy of a deed from Williams was produced.

A nonsuit or default was to be entered or a new trial granted, according to the opinion of the Court.

Sept. 8th. *Dwight* and *Hubbard*, for the plaintiff, contended that there was an incumbrance on the land, by reason of the judgment against M'Kinstry; in support of which they referred to the statutes of New York. There was a paramount title in this

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case, and the plaintiff is entitled to recover back the purchase money and interest, without an eviction; *Chapel* v. *Bull*, 17 Mass. R. 220; but the evidence in the case shows an eviction according to the law of New York. *Kane* v. *Sternbergh*, 1 Johns. Cas. 153; *The People* v. *Nelson*, 13 Johns. R. 340; *Jackson* v. *Sternberg*, 20 Johns. R. 49; *Gore* v. *Brazier*, 3 Mass. R. 523; *Hamilton* v. *Cutts*, 4 Mass. R. 349; *Prescott* v. *Trueman*, ibid. 627. According to *Gore* v. *Brazier*, the Court may consider the covenant of warranty to have been broken.

C. A. Dewey, for the defendant, denied that at the time of 348
the conveyance to the plaintiff, there was any subsisting lien by virtue of the judgment, or that there was any power of reviving the judgment, so as to create a lien. Nothing passed by the sheriff's sale, for his return does not show that he took every step required by law, to make a valid sale. *Williams* v. *Amory*, 14 Mass. R. 20. In New York, the sheriff's deed does not give seisin, but the purchaser must make an entry or bring his action of ejectment. The plaintiff relies on the covenant of warranty, but he fails to show an actual ouster under the sheriff's sale; for it does not appear by legal evidence, that there was any connexion between the occupants of the land and the title derived from that sale. If a sheriff's sale and deed can of themselves amount to a breach of a covenant against incumbrances, the Court will at any rate require that all his proceedings should be regular.

PARKER C. J. afterward drew up the opinion of the Court. The first question is, whether there is sufficient proof of ouster to form an eviction, there being a lien on the land by the judgment recovered in 1786 against M'Kinstry, which remained unsatisfied until 1801.

If there was not an eviction, then was there an incumbrance, at the time of the conveyance to the plaintiff?

It seems that by the law of New York before the year 1813, a judgment docketed created a lien on land and tenements, indefinite in point of time, so that a sale by the sheriff at any future time would pass a title to the purchaser against any *bonâ fide* holder under the debtor. By the statute passed in 1813, that lien was to continue ten years from 1811. The

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sheriff's sale of this land was long before this statute, to wit, in 1801, when there was no limitation to the lien.

This lien was an incumbrance, which might or might not be injurious to the plaintiff; and it formed a secret canker in the title, which might eventually defeat his estate, but which might never be made to operate to his prejudice. The lien itself was a breach of the covenant against incumbrances;[1] but without something further, the damages would only be nominal; for it was an inert incumbrance, which might never be brought into action. But proceedings were afterwards had,
349 which, if regular and pursuant to the laws of New York, would defeat the title of the plaintiff and prevent him from entering upon and enjoying the estate. In 1800 the judgment was revived, and so far as we can perceive from the record, in all respects pursuant to the law of New York. Execution was issued and delivered to the sheriff, who made sale of the land which is the subject of the covenants.

If this sale is regular, it would seem to convey a complete title to the purchaser, and give him an immediate right of entry upon the land. We observe by the statute passed in 1813, that the sheriff was required, before he should make sale on execution, to advertise the time and place of sale with great particularity, and to sell between the hours of nine in the morning and sunset. We think any sale, after the passing of this statute, would not be good unless it should appear by the return of the sheriff on his writ that he had complied with these requisitions. At least, such is our law in regard to analogous proceedings in the sale of equities, &c. and we suppose the law of New York to be the same. We are not informed however, whether at the time of the sale of this land such proceedings were required; or if required, that they should be set forth in the sheriff's return, or recited in his deed to the purchaser; but without, it must be presumed, unless the contrary be shown by the defendant in this action, that

[1] See *Smith* v. *M'Cambell*, 1 Blackford, 100. This covenant is broken at once by the existence of an outstanding incumbrance. *Potter* v. *Taylor* 6 Vermont R. 676; *Richardson* v. *Dorr*, 5 Vermont R. 9; *Garrison* v. *Sandford*, 7 Halsted, 261; *Tufts* v. *Adams*, 8 Pick. 547; *Stewart* v. *Drake* 4 Halsted, 139; *Bean* v. *Mayo*, 5 Greenleaf, 94.

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the sale was regular and that the title, by the deed of the sheriff, vested in the purchaser. If this be so, the case seems to be parallel with that of *Chapel* v. *Bull*, 17 Mass. R. 213, in which it was decided, that on a breach of covenants against incumbrances, where the incumbrance was changed into a title adverse and indefeasible, the plaintiff was entitled to recover the money he had paid for the land, with interest. For in such case, the estate conveyed is entirely defeated, and the purchaser cannot remove the incumbrance; nor can he enter upon and enjoy the land; and it would be idle to require him to purchase it, in order that he might be entitled to his damages for the breach of the covenant against incumbrances. Indeed, such a state of facts comes very near proving an actual eviction, and falls short of it only because there has been no actual possession by the grantee, so that he can be evicted. And this constitutes a difference between cases of 350 this kind and the common cases of mortgage, attachment or rights of dower, which may be removed by the grantee, and the amount of his damages ascertained in that way.[1]

The principle which constitutes a difference between the case of *Chapel* v. *Bull*, and the cases in which it has been held, that, for breach of covenant against incumbrances, nominal damages only should be recovered, unless the incumbrance had been removed, is, that in the latter cases the plaintiff is in possession of the estate, is undisturbed in the enjoyment, and may remain so; whereas, in the former case, and that now before us, the plaintiff is not in possession, nor can he enter without being a trespasser upon one who has the title, and who is presumed to be in possession according to his title.

But, in order to entitle the plaintiff to recover upon these principles, we must take it for granted, that the sheriff's sale is valid according to the law existing at the time. So that if the defendant can show that there was a neglect on the part

[1] Where there is an outstanding incumbrance upon the land, the purchaser need not wait until he is evicted, but may satisfy the incumbrance, and then resort to his action on the covenant against incumbrances. *Delavergne* v. *Norris*, 7 Johns. R. 358; *Stanard* v. *Eldridge*, 16 Johns. R. 254; *Garrison* v. *Sandford*, 7 Halsted, 261. Yet he is not bound to buy in the incumbrance though it be offered to him on moderate terms. *Miller* v. *Halsey*, 2 Green 48.

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of the sheriff, of any material part of his duty, there would be nothing to intercept the plaintiff's title, and so no breach of covenant.

Upon the ground of eviction, so as to entitle the plaintiff to recover the present value of the land in damages, we think the evidence defective. Supposing the title to be in Williams by the conveyance of Dean to him, Dean having the deed from the sheriff, yet it does not appear by any competent evidence that his title has ever been asserted by an entry by himself or any person under him. The depositions show an actual possession and occupation, and payment of taxes by several persons, but there is no legal evidence of their title under Williams. It is probable that Williams conveyed to a certain individual, as stated by the witnesses, but the evidence of title should be by deed; and there is no apparent reason why the deed from Williams to such individual should not have been produced. The fact of possession, as proved by the witnesses, stands disconnected from any title, and therefore we cannot know that it was not unlawful; and if it was so, it is no breach of the covenant of warranty.[1]

351 Upon the whole, therefore, we are of opinion, that the covenant against incumbrances is broken, and that the proper damages are the amount of the consideration and interest. We however will suspend the judgment, if it can be made to appear by affidavit or otherwise, to our satisfaction, that there is any defect in the proceedings of the sheriff which will go to defeat the title under him.

[1] See 1 U. States Dig. *tit. Covenant*, § 298

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF HAMPDEN, SEPTEMBER TERM 1839, AT SPRINGFIELD.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

JOSEPH ELY *et al. versus* GEORGE BALL *et al.*

If exceptions are unseasonably filed to an interlocutory order of the Common Pleas in an action in which the party excepting wishes to have a trial, he should enter his exceptions in this Court, where they will be dismissed, and then the action may be brought forward on the docket of the Common Pleas.

THE writ in this case was indorsed "J. and C. Ely, by their attorney, S. Lathrop." In the Court of Common Pleas the defendants moved that the action might be dismissed, because the writ was not indorsed with the christian and surname of the plaintiffs, &c. as required by *St.* 1784, *c.* 28, § 11, but the motion was overruled, and thereupon the defendants filed exceptions. The adjudication however not being a final disposition of the case in the court below, so that the exceptions were filed too soon, [*Piper* v. *Willard & Tr.* 6 Pick. 461,] the defendants omitted to enter the action in this Court on the first day of the term. And now upon a complaint for not entering the action, *G. Bliss* junior said the defendants

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Ely v. Ball.

were desirous of having the action entered, and suggested that the decision of the Court below would be affirmed of course and a trial would be had in this Court. But *per Curiam*. The only course (except by consent) will be for the defendants to enter the exceptions, and for this Court to dismiss them; and then the Court of Common Pleas will bring the action forward upon their docket.[1]

Lathrop, for the plaintiffs.

WILLIAM WADE *et al. versus* CHARLES HOWARD *et al*

In a writ of entry, a plea that in a former writ of entry the tenant recovered judgment for costs, without stating that such judgment was upon the merits, is insufficient.

Sept. 16th. WRIT of entry upon a disseisin done to the father of the demandants. Plea, that the father brought a writ of entry against the tenants for the same land, and that the tenants recovered judgment for costs. To this there was a general demurrer.

J. H. Ashmun and *G. Bliss* junior, in support of the demurrer, objected that the plea did not state that issue had been joined in the former action, or that there had been a judgment upon the merits, and in fact the judgment was upon a nonsuit; neither is it alleged that the same title was in question.

Lathrop and *Willard*, *contrà*, said that the demandant should have replied that the judgment was upon a nonsuit.

But the Court held that the plea was bad.

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[1] See *Commonwealth* v. *Moore*, 3 Pick. 194; *Piper* v. *Willard*, 10 Pick. 34.

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COMMONWEALTH *versus* MARCUS R. STEPHENSON *et al.*

The window of a dwellinghouse being covered with a netting of double twine nailed to the sides, top and bottom, it was *held*, that cutting and tearing down the netting and entering the house through the window, were a sufficient breaking and entry to constitute burglary.

INDICTMENT for *burglary*. The evidence as to breaking was, that in the evening of May 22, the witness fastened the outer door of the dwellinghouse by turning a button down upon the latch, and that about daybreak in the morning he found the door open, and also that the network of the buttery window had been cut away and torn down. The netting was made of double twine, and was fastened by nailing it on each side, and at the top and bottom of the window, for the purpose of letting in the air and keeping out cats and other smaller animals. Within the network there was a glass window, which had not been shut. *Putnam* J. instructed the jury, that if the defendants broke, cut or tore away the net so fastened, it was in law a breaking of the dwellinghouse. The defendants being found guilty, moved for a new trial because the foregoing instruction was wrong.

Bates and *G. Bliss* junior, for the defendants. Entering by an open window will not sustain an indictment for burglary; 2 Russell, 901; 1 Hawk. P. C. *c.* 38, § 4, 5; 4 Bl. Com. 226; *Callon's case*, cited in 2 Russell, 903; and the circumstance that a netting was stretched across the window in the present case, is immaterial, as this netting was put up only as a security against the entry of small animals. The window was the natural protection against an entry by man. To constitute a breaking, the thing broken must be a part of the house 1 Hawk. P. C. *c.* 38, § 4, 5; Foster, 108; 1 Hale, 552; 2 Stark. Ev. 320. This netting was not even a fixture *Beck* v. *Rebow*, 1 P. Wms. 94; *Gale* v. *Ward*, 14 Mass. R. 356; *Whiting* v. *Brastow*, 4 Pick. 310; *Commonwealth* v. *Trimmer*, 1 Mass. R. 476. In favor of life, a distinction is made, as to what constitutes a part of the house, between cases relative to mere property, and those in which life is concerned. *Sept.* 17*th*

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Common-wealth v. Stephenson.

Foster, 109 ; 2 East's P. C. 489. And though this is not a case of capital burglary as the defendants were not armed, yet in regard to the facts necessary to constitute a breaking, the Court will not lay down different rules for the different degrees of burglary.

Davis (Solicitor-General) cited 3 Chit. Crim. Law, 1093 ; [3d Am. edit. 1107 ;] 1 Hale, 552 ; East's P. C. 487 ; 4 Bl. Com. 226.

PARKER C. J. delivered the opinion of the Court. The question in this case is, whether there was a breaking or not. The lifting a latch and opening the door, though not bolted or locked ; the shoving up a window, though not fastened ; the getting down a chimney, and various other acts done to effect an entry, are held to be a breaking.[1] The offence consists in violating the common security of a dwellinghouse, in the night-time, for the purpose of committing a felony. It makes no difference, whether the door is barred and bolted, or the window secured, or not ; it is enough that the house is secured in the ordinary way ; so that by the carelessness of the owner in leaving the door or window open, the party accused of burglary be not tempted to enter. Shutting the window-blinds and leaving the windows open for air, is a common mode of closing a house, in the warm season ; if the blinds are forced, it is a breaking.

The objection is, that the lattice-work of the dairy window was of twine only. Suppose it were of wire, or thin slats of wood, would there be any difference ? This network was nailed down on all sides ; it was torn away by the defendants, and they entered the breach. This is quite sufficient to constitute a burglarious breaking and entry.

Motion for a new trial overruled.

[1] See *State* v. *Wilson*, Coxe, (N. Jers.) 439 ; *Commonwealth* v *Steward*, 7 Dawes's Abr. 136.

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HORACE WHITE *et al. versus* OLIVER MOSELEY *et al.*

The plaintiffs being owners of a close and a mill thereon, on the north side of a river, and their mill-dam being rightfully extended to land on the other side, which they did not own, the defendants crossed the river below the plaintiffs' land and destroyed a part of the dam on the south side, and having effected their object, they recrossed the river at the same place and went upon the plaintiffs' close. It was *held*, that the destruction of the dam and the entry upon the close were distinct trespasses, so that a judgment in trespass *quare cl. fr.* for the latter would not be a bar to a like action for the former.

Held also, that in trespass *quare cl. fr.* for the destruction of the dam, the plaintiffs were entitled to recover consequential damages for the interruption of the use of their mill, this injury being set forth in the declaration.

TRESPASS *quare clausum fregit* for breaking down and destroying part of a mill-dam belonging to the plaintiffs. The general issue was pleaded and joined. Also, a former suit and recovery for the same cause of action. The plaintiffs replied that the former suit was not for the same cause of action; and thereupon issue was joined. The cause was tried before *Parker* C. J. The plaintiffs were in possession, claiming title, of a parcel of land on which they had a mill, on the north side of the stream, and they, and those before them, had extended the mill-dam quite across the stream to the south bank, not claiming any title to the land on that side, but having occupied it in this manner for more than fifty years.

The evidence on the second issue was only the record of the two actions, and by direction of the judge, the jury found this issue for the plaintiffs; but it was admitted, that the act complained of in the former suit, for which damages were given, was the passing over the mill-lot by the defendants, after they had returned from the south side of the river, and had destroyed a part of the dam.

On the first issue it was proved, that the defendants, with a number of other persons, crossed the stream at a fording-place about twenty rods below the mill-lot, and went to the south end of the dam, and with force and violence broke and tore up a part of the dam. No justification or excuse for this act was pleaded or proved. The defendants then recrossed the river at the fording-place, and went upon the mill-lot and about the mill. The only defence was, that the trespass sued for

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White v. Moseley.

in this action, was the same which had been sued for in a former action; so that the second action could not be maintained. This was overruled, and a verdict was returned for the plaintiffs for reasonable damages.

Damages were assessed for the cost of repairing the dam, and also for interruption to the use of the mill or diminution of profits, occasioned by the water flowing through the breach in the dam and by that means falling too low for the working of the mill; and it was objected that damages for this latter cause could not be recovered in this action.

If the Court should determine that the issue on the second plea ought to have been found for the defendants, the plaintiffs were to become nonsuit; otherwise judgment was to be rendered for the plaintiffs, either for the whole damages, or with a deduction of the damages assessed on account of the interruption of the mill, as the Court should order.

Sept. 15*th.* *J. H. Ashmun* and *Blair*, for the defendants. The plaintiffs, by their allegations in the former action, confined themselves to a recovery for the injury done on the north side of the river They now sue for the damage done on the south side. We contend that there was but one trespass. Where there is only one act, or a series of acts in pursuance of one object and one general plan, only one trespass is committed. Here there is but one close, for the lands described in both actions adjoin; all the acts are by one body of men, in concert, pursuing the same object. For a single transaction, the plaintiff can recover but one satisfaction. *Hudson* v. *Lee*, Moor, 268; *Fetter* v. *Beale*, Holt, 12; Hob. 94. A single contract supports but one action; *Hawkins* v. *Cardee*, 1 Salk. 65; 1 Ld Raym. 360; *Smith* v. *Jones*, 15 Johns. R. 229; *Smith* v *Whitney*, 11 Mass. R. 445; and the same principle applies in cases of tort. *Farrington* v. *Payne*, 15 Johns. R. 432. The plaintiffs' action and recovery for a part of the trespass, are as much a bar as if they had recovered for the whole. *Phillips* v. *Berick*, 16 Johns. R. 136. A former judgment is a bar to a subsequent action, where the same evidence will support either action. *Kitchen* v. *Campbell*, 3 Wils. 304; *Lechmore* v. *Toplady*, 1 Show. 146; *Put* v. *Rawsterne*, T. Raym. 472; *S. C.* 2 Show. 211. If the plaintiffs had in the

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first suit described the whole close properly, and in one count had set out all the mischief done, they might unquestionably have recovered for the whole. It was their own laches to narrow their claim by their mode of declaring in the first action, and the case is just as if they had neglected to bring a witness to prove a part of their claim In the former action, reported in 5 Pick. 230, the question was, whether the plaintiffs could give evidence of the injury now complained of, in aggravation of damages, and the Court held that they could not. It is not to be inferred, however, that this is a distinct cause of action; but the point was, that it was not included in the declaration. Hammond's N. P. 89.

Damages for the interruption of the mill ought not to have been assessed. The action is trespass *quare clausum fregit*, and the mill is not upon the close described.

Lathrop and *Bates*, for the plaintiffs, said there were two distinct acts of trespass. One trespass was completed before the other was begun. The same evidence will not support each.

Ashmun said, in reply, that Moseley was sued in the former action. He went upon the mill-lot only, and the chief justice properly instructed the jury, that if he stood there encouraging the others who were upon the close now described, he was a trespasser with them. If therefore this action is sustained, he subjected himself at the same moment to two actions, and while he had in view but one design. This shows that only one action ought to have been brought. If the defendants were merely returning home from the mischief done, there was clearly but one trespass.

Per Curiam. The question is, whether the acts of the defendants constitute more than one cause of action. If only one, then the former judgment is a bar to the present action, and it was either the misfortune or the neglect of the plaintiffs, that they did not recover in the former suit damages for all the injury they sustained. The defendants went upon one close and destroyed part of the mill-dam, and then went upon the other close. If they had gone upon this other close in order to complete their design, there would have been but one trespass, and the circumstance that they passed over the land of a

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stranger in going from one close to the other would be immaterial. But it seems to us, that the object of the defendants was to destroy the mill-dam, and this was effected before they recrossed the river; and their going upon the other close was rather accidental and not with any reference to the mill-dam. The former judgment therefore is not a bar to this action.

A question is raised in regard to the consequential damages. The interruption to the use of the mill and the diminution of the plaintiffs' profits on that account, were alleged in the declaration, and proved at the trial; and we think this was right. The plaintiffs are entitled to recover for all the damage they suffered by reason of the trespass.

Judgment according to verdict.

Timothy Ferrill, Petitioner, &c. *versus* Jonathan Simpson.

On a petition for a review in this case, which was a writ of entry, notice was ordered to be served on the demandant's attorney of record. The demandant was only a nominal party, and the parties in interest (three in number) were present when the order was passed. Such notice being now objected to, the Court said that as no particular mode of notice was prescribed in the statute respecting reviews, if the party interested had substantial notice, they saw no reason why he should not answer.

Upon the hearing of the petition, the counsel for the demandant produced one of the jurors to testify that a misapprehension at the trial, in regard to a certain line, had no influence upon the verdict; and to show that such evidence was admissible, they cited *Ex parte Caykendoll*, 6 Cowen, 53; *The People* v. *Columbia C. P.* 1 Wendell, 297.

The Court said that as the petition was addressed to the discretion of the Court, the evidence might be admitted The juror was accordingly examined.[1]

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[1] See *Hix* v. *Drury*, 5 Pick. (2d edit.) 301, note 1; *Dorr* v. *Fenno*, 12 Pick 526; *Parrott* v. *Thatcher*, 9 Pick. 426

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GEORGE LOWRY *versus* WILLIAM RUSSELL Junior.

By a bill of lading expressing that goods are to be carried from one port to another, a direct voyage is *primâ facie* intended; but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper, that such a course is to be pursued.

ACTION on the case against the defendam, as owner of the sloop Justicia, for a loss sustained by the plaintiff in consequence of a deviation by the master.

At the trial, before the chief justice, the plaintiff produced in evidence a bill of lading signed by Seth Anthony, the master of the sloop, whereby Anthony undertook, for freight, to transport eight hogsheads of sugar therein specified, belonging to the plaintiff, from New York to Georgetown in the District of Columbia. The sloop sailed from New York with the sugar, having on board goods for Norfolk, in Chesapeake Bay, which is from twenty to thirty miles out of the direct course to Georgetown. She put into Norfolk, without being compelled by stress of weather or other necessity, for the purpose of delivering the goods she had taken on freight for that place; and having remained there three days and discharged those goods and taken in goods for Alexandria, she sailed for Georgetown, and on her voyage to that place was lost by the perils of the seas, and the plaintiff's sugar was destroyed.

The declaration averred that the property was insured, and that the underwriters refused to pay the loss, on the ground that there had been a deviation.

The defence was, that the sloop was a general coasting vessel from New York to Norfolk and other places on the Chesapeake, and rivers running into that Bay; that it was the usage of such vessels to take freight for several ports, stopping at the first port and passing on to the others successively, leaving the goods taken for each, and taking in other goods; that this usage was general and public; that the cargo taken on board before the plaintiff's sugar was shipped, was for Norfolk; that painted signs were put up on the shrouds of the vessel, indicating that she was bound to Norfolk, and that she was advertised in two newspapers printed in New York, one of which was taken by

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the plaintiff's agent there, as bound to Norfolk; this advertisement being published several days before the sugar was shipped, and daily until the vessel sailed. The proof of the usage was contained in certain depositions introduced by the defendant.

The jury were instructed, that if they were satisfied of the existence of the usage, and that it was of long continuance and general and notorious, the defence was sustained; and they found a verdict for the defendant. If this instruction was wrong, or if the depositions were not legal evidence of the usage, the verdict was to be set aside; unless the notice by the signs on the vessel and the advertisement in the newspapers was conclusive upon the plaintiff as to knowledge of the destination of the vessel to Norfolk, and with such knowledge he could not support his action.

Sept 16th. *Davis* (Solicitor-General) and *Lathrop*, for the plaintiff. There was a deviation, first in going to Norfolk; secondly, in remaining there so long; and thirdly, in taking in cargo there. The deviation being manifest, the burden is on the defendant to prove a usage which will justify it. A usage must be proved by evidence of particular instances within the knowledge of the witnesses, and not by mere opinion or common report. *Edie* v. *East India Co.* 2 Burr. 1228; 2 Stark. Ev. 452; *Gordon* v. *Little*, 8 Serg. & Rawle, 551. The usage here set up is, of a right to stop at any intermediate ports and take in or discharge cargo. The evidence relates to coasting vessels generally. There may be a usage of the kind mentioned, between particular ports, and not between others. The particular usage between New York and Georgetown ought to have been proved. Only one witness testified as to this, and he specified but two instances. Evidence of a usage between other places was irrelevant.

No information was communicated to the plaintiff of the master's intention to stop at Norfolk and discharge and take in cargo; and no evidence was admissible to prove such intention, as it was not inserted in the bill of lading. The contract was to carry the sugar from New York to Georgetown in the most direct course. *Barrett* v. *Rogers*, 7 Mass. R. 297; *Portland Bank* v. *Stubbs*, 6 Mass. R. 422; *Hunt* v. *Rousmanier*.

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6 Wheat 211; *Pickering* v. *Dowson*, 4 Taunt. 779; Abbott (Story's ed. of 1829), 212, 213, *c.* 2, § 2.

Bates, contrà, cited as to usage, Phillips on Ins. 18, 182.

The plaintiff is concluded by the notice of the destination of the vessel. 1 Stark. Ev. 165; 2 Stark. Ev. 338; 3 Stark. Ev. 1079; *Leeson* v. *Holt*, 1 Stark. R. 186; *Jenkins* v. *Blizard*, ibid. 418.

Per Curiam. The bill of lading, like other contracts, is to be construed according to the intention of the parties. Usage of trade is always presumed to be within the knowledge of the parties, and these contracts are supposed to be made with reference to it. There is nothing in the evidence in the present case, contradicting the express terms of the bill of lading, which are that the goods shall be carried from New York to Georgetown. A direct voyage is *primâ facie* intended, but this may be controlled by usage, or by personal knowledge of the shipper. There was competent evidence of the usage in relation to vessels like this; and there was also evidence that this voyage was known to be by the way of Norfolk. The plaintiff's agent knew of it, and his knowledge must be imputed to the plaintiff himself.[1] *Sept.* 17th.

Judgment according to verdict.

[1] See Story's Comm. on Agency, 131, 132.

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JOSEPH CAREW *versus* NATHANIEL P. DENNY.

Where a promissory note, payable in machine cards at cash price, was made to a person who was afterwards put under guardianship, and the guardian assigned to the plaintiff "the balance which may be due on the note after deducting what may be due to one H, not exceeding 500 dollars," the note being then in the hands of one F, pledged for the payment of H's debt, and the guardian guarantied to the plaintiff "the payment of the note according to its tenor, after deducting the claim of H, which shall not exceed 500 dollars, "it was *held*, in an action upon the guaranty, that if H had lost his lien, still the plaintiff's claim under the guaranty was not thereby augmented, for only the balance after the amount due to H, was assigned and guarantied to the plaintiff.

Held also, that the assignment and guaranty did not include a sum which had been previously paid and indorsed upon the note, there having been no fraudulent concealment on the part of the guardian, of such indorsement.

Held also, that H's demand, not exceeding 500 dollars, was to paid be in money, so that although cards of more than 500 dollars worth at the appraised cash price were sold to produce that sum, only the balance of cards remaining due on the note was assigned and guarantied.

Such balance having been accepted by the plaintiff, of the maker of the note, it was *held*, that if there was any fraud as to the quality, the guardian was not responsible for it, it being the duty of the plaintiff to examine the cards.

THIS was assumpsit upon the following contract, dated April 13, 1825, *viz.* — "Whereas Horace Smith heretofore made three several notes to Alpheus Smith for 2000 dollars each, payable in machine cards, one of which notes is now in the hands of Austin Flint of Leicester, and on which said Flint has a lien for the payment of a debt to H. G. Henshaw, of not more than 500 dollars, — and whereas the balance of said note, after paying said Henshaw's debt, has been this day assigned to Joseph Carew of Springfield, a creditor of said Alpheus Smith, — I do hereby warrant and guaranty to said Carew the payment of said note according to its tenor, after deducting the claim of said H. G. Henshaw, which shall not exceed 500 dollars : — The said Carew agreeing to take any sum not less than 500 dollars, upon reasonable notice, towards the payment of said note. Nathaniel P. Denny."

At the time of the execution of this contract, Alpheus Smith was indebted to the plaintiff in a large sum of money, and Horace Smith was indebted to Alpheus upon three promissory notes, one of which, dated January 21, 1824, was for the sum of 2000 dollars, payable in good merchantable machine cards

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at cash price, in three years from the date, with interest annually. By an instrument under seal, dated April 13, 1825, Denny, as guardian of Alpheus, assigned to the plaintiff "the balance which may be due" on this note, "after deducting what may be due to Horatio G. Henshaw from said Alpheus, not exceeding 500 dollars, which said note is now in the hands of Austin Flint, and is there to remain until said Henshaw is paid." The plaintiff at the same time executed an agreement, in which it is stated, that the amount due to him could not then be ascertained, and he agrees, in case the property assigned should exceed the debt, to pay over the balance to the defendant, "it being understood that the cards received by virtue of the assignment shall be sold as soon as may be, and at the best advantage, and the proceeds shall be applied first to the payment of the debt to H. G. Henshaw, and the residue to the discharge of said Carew's claims."

There was an indorsement upon the note, under date of January 27, 1824, of a payment of 286 dollars 27 cents.

The demand of Henshaw against Alpheus Smith was on a promissory note, dated January 31, 1824, on which Henshaw recovered a judgment in March, 1826, for 569 dollars, being the principal, interest and costs. In April, 1826, Horace Smith, at the request of Henshaw, engaged to make the cards in about a month, to pay Henshaw the amount of his judgment; and Henshaw stated that he should write to Carew for his consent; which if he did not obtain, he should wish the cards to be delivered and he should take them on execution, and have them sold on execution to satisfy his judgment. Accordingly on May 10, 1826, Horace Smith had prepared cards for delivery, and two persons were called in to appraise them. A quantity appraised at 1308 dollars 50 cents, was sold by auction by a deputy-sheriff, under the execution, the proceeds of which were no more than sufficient to satisfy the execution, and the sum of 1308 dollars 50 cents was then indorsed by Flint as so much paid upon the note. It appeared that the plaintiff had notice of the intention to turn out the cards and to sell them on execution, Washburn, the attorney of Henshaw, having written to Packard, agent of Carew, a letter dated March 21, 1826, in which he says, that Henshaw is in want of his money,

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and that Horace Smith is ready to pay the cards due on the note in Flint's hands; and Washburn asks, whether Carew "will take all the cards and pay Henshaw's debt, or let Henshaw take enough to pay himself and leave the rest for Carew. Have you or Carew any objection to Horace's paying Henshaw, within a fortnight, cards enough to satisfy his debt? If either of you have any thing to say on the subject, I wish you to write me soon; as the cards will be ready for sale in a fortnight, and Henshaw has judgment on his note, and will sell them on execution when turned out to him." But there was no evidence that Carew consented to this proposition, otherwise than by not answering the letter. He lived more than thirty miles from Leicester, where these transactions took place. When the note guarantied became due, the plaintiff called on Horace Smith for the cards, and Horace showed him cards ready for delivery. The plaintiff asked if those were all; and was informed that they were. These cards had before been appraised by two persons, having been examined by a person who accompanied the plaintiff for that purpose, and who stated that they were merchantable according to the contract. This person looked at the exterior of the bundles, without opening or separating them. They were then delivered to the plaintiff at the appraisement. The balance of the note thus paid was about 670 dollars. The defendant was present at this time. The plaintiff, being asked by Flint if he should give up the note to Horace Smith, turned to the defendant and asked him. The defendant said he had nothing to do with it. Where pon the plaintiff said it might be given up; and thereupon it was given up by Flint as paid. The cards were afterwards transferred to Springfield, where they were received by an agent of the plaintiff. There was evidence tending to prove that they were not of a merchantable quality, and were worth much less than the sum at which they were appraised, being packed so as to deceive; and there was evidence to contradict this; but the judge who tried the cause being of opinion that the acceptance of them by the plaintiff, upon such examination as took place, was a payment *pro tanto*, as it respected the defendant's guaranty, and that if any fraud was practised, the

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defendant was not answerable for it, this evidence was considered irrelevant and was rejected.

The plaintiff insisted that the guaranty covered the whole of the note, except the claim of Henshaw to the amount of 500 dollars, without regard to the sum indorsed upon the note, paid before entering into the guaranty, and offered evidence to show that he did not know of this indorsement. But the judge was of opinion, that the evidence was irrelevant, whether the parties were or were not ignorant of the indorsement, unless the defendant knew and concealed the fact from the plaintiff; of which there was no evidence. The judge was of opinion, that the guaranty covered the sum due on the note at the time when the contract was entered into, and no more.

The defendant insisted that the legal effect of his contract of guaranty was only to the extent of what should be due on the note, after deducting the appraised value of the cards taken to satisfy the debt of Henshaw and costs of suit and of sale. *viz.* 1308 dollars 50 cents, and also deducting the sum previously indorsed; so that the plaintiff having received cards for the balance according to this computation, the guaranty was satisfied and discharged. The judge was of opinion, that no further allowance could be made on account of Henshaw's debt, than 500 dollars.

The plaintiff insisted, that by reason of the judgment and execution, and the proceedings under them, Henshaw had lost his lien on the note, and therefore that the defendant was liable for the whole amount of the note upon his guaranty; but this was overruled.

The question as to the correctness of all these opinions was reserved for the consideration of the whole Court.

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J. H. Ashmun and *G. Bliss* junior, contended, that by the terms of the guaranty, the sum of 286 dollars 27 cents, indorsed on the note, was not to be allowed the defendant, as nothing but the debt of Henshaw was excepted. As to the extent and construction of guaranties, see Fell on Guar. 116, 129; Chitty on Contr. 21; *Cumpston* v. *M'Nair*, 1 Wendell, 461; *Merle* v. *Wells*, 2 Campb. 413; *Mason* v. *Pritchard*, 2 Campb. 436 and 12 East, 227; 3 Wheat. 148, note; *Cremer* v. *Higginson*, 1 Mason, 335. The note, as contem-

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plated by the parties, is recited in the contract, and this recital is to govern. *Arlington* v. *Merricke*, 2 Saund. 411 ; *Barker* v. *Parker*, 1 T. R. 287.

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The lien of Henshaw was discharged by the manner in which he proceeded to enforce his demand, and so the 500 dollars should not be deducted. The assignment was subject to the lien, and that being removed, the whole note was assigned. *Cleverly* v. *Brackett*, 8 Mass. R. 150; *Swett* v *Brown*, 5 Pick. 180 ; *Gilman* v. *Brown*, 1 Mason, 215, 217 ; Metcalf's Yelv. 67 *e* ; *Cowell* v. *Simpson*, 16 Ves. 281 ; *Cortelyou* v. *Lansing*, 2 Caines's Cas 211.

The plaintiff did not assent that the cards should be sold before the note fell due ; he had no notice of the day and place of sale ; and whatever might be the rights of Henshaw as to his lien, the premature delivery and sale of the cards were a breach of the defendant's guaranty. *Garlick* v. *James*, 12 Johns. R. 146 ; *Cortelyou* v. *Lansing*, 2 Caines's Cas. 204 ; Metcalf's Yelv. 177 *a*.

The sale of the cards by the officer by auction, and at Leicester, which was not a suitable market, and upon the short notice of four days, was a breach of the guaranty. The plaintiff was at least entitled to have the cards sold in a prudent manner, and not at a great sacrifice.

The cards delivered to the plaintiff were deficient in quality through the fraud of Horace Smith. There was therefore no payment to the plaintiff, and although he might have an action against H. Smith, he is not obliged to look to him, but may rely, for his remedy, upon the guaranty.

Bates, for the defendant.

Sept. 17th.

WILDE J. delivered the opinion of the Court. The plaintiff claims to recover in this action the whole amount of the note assigned to him by the defendant ; and the defendant, on his part, contends that, upon the facts appearing in the report, he is by law wholly discharged from his responsibility.

The defendant was the guardian of one Alpheus Smith, who was indebted to the plaintiff in a large amount, and the note in question was assigned for the purpose of satisfying that demand ; the plaintiff agreeing to account with the defendant, as guardian of Smith, for the amount he should receive on the

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note assigned, and to pay over the balance, if any there should be, after satisfying his own demands.

By the terms of the assignment, the plaintiff became entitled to the balance due on the note assigned, after deducting the claims of one H. G. Henshaw, to whom the note had been pledged, which claims were however not to exceed the sum of 500 dollars.

It appears that after the assignment of the note, Henshaw commenced a suit against Alpheus Smith for the recovery of his demand, and proceeded therein to judgment and execution; and it has been argued for the plaintiff, that Henshaw thereby virtually relinquished his lien on the note. We think however that this is immaterial in the present action; for if the lien on the note was discharged by these proceedings, still, by the terms of the assignment and guaranty, Henshaw's claim, to the amount of 500 dollars, was to be satisfied out of the proceeds of the note, and as to this amount the plaintiff has no title under the assignment and guaranty. So that the only question on this part of the case is, as to the amount to be deducted for Henshaw's claim — whether it shall be limited to the sum of 500 dollars, or is to be extended to the amount of sales which were made on Henshaw's execution to satisfy that amount. And we think, that by the obvious construction of the defendant's contract, the amount of sales must be allowed. Henshaw's debt, not however to exceed the sum of 500 dollars, was to be paid. The limitation clearly applies to the debt, and not to the amount of sales which might be made to pay it. The whole of Henshaw's debt, provided it should not exceed 500 dollars, was to be discharged by the sale of cards, to be delivered according to the terms of the note. Whether the cards would sell for more or less than the appraised value, could not have been ascertained at the time of the contract, nor is there any reason to suppose that such a question was within the contemplation of the parties. Henshaw was under no obligation to receive his pay in cards; and when Horace Smith, the maker of the note, turned them out at an appraised value, the plaintiff, if he wished to avoid any loss by a forced sale, should have prevented it by paying Hen-

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shaw's demand, as he might have done, for he had notice of the intended sale.

The plaintiff must have been aware of the construction now put on the contract of assignment and guaranty, by Washburn's letter to Packard, the plaintiff's agent; yet he made no objection to the sales under Henshaw's execution; but on the contrary, he impliedly ratified and confirmed them, by receiving the balance of the note and delivering the note up to the maker.

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We are therefore clearly of opinion, that the amount of sales, to the extent of satisfying Henshaw's demand to the amount of 500 dollars, must be allowed in payment in favor of the defendant. So far as the sales exceeded the amount necessary for this purpose, the plaintiff is entitled to recover in this action; and the cards thus sold are to be accounted for at their just value, and the indorsement of 1308 dollars 50 cents must be reduced accordingly, to the amount necessary to satisfy the sum of 500 dollars, and no more.

As to the sum of 286 dollars 27 cents, indorsed before the assignment of the note, that also we think must be allowed. It was contended at the trial, that this sum ought not to be allowed without proof that the plaintiff or his agent had knowledge of the indorsement, at the time of the assignment of the note; and evidence on this point was offered by both parties, which however was thought immaterial, no evidence being offered to show any fraudulent concealment on the part of the defendant; and we are all of the same opinion. We can not infer from the language of the assignment or the guaranty, that the defendant intended to stipulate that any particular sum was due on the note. The intention was to assign the balance actually due, whatever the amount might be, subject to a deduction to the extent of Henshaw's debt under the limitation specified.

The amount of the plaintiff's demand was not known, nor could it be ascertained whether the balance due on the note was sufficient, or more than sufficient, to discharge the demand Accordingly the balance, after making the stipulated deduction, was to be received and accounted for by the plaintiff, but the amount of the balance was not escertained.

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The sum of 669 dollars 61 cents, received in cards from Horace Smith, must also be allowed. If there was any fraud or deception as to the quality of the cards practised by him, the defendant is not responsible for it. The cards were accepted by the plaintiff, and it was his business to examine their quality, and the loss, if any, should fall on the plaintiff, rather than on the defendant, who had no concern in that transaction. 370

Judgment for plaintiff.

COMMONWEALTH *versus* WILLIAM F. LORING.

An indictment under the second section of *St.* 1814, *c.* 175, for receiving and concealing a dead body, was sustained, where the evidence, though it had a tendency to prove an offence under the first section, of digging up the body, did not conclusively prove such offence.

Penal statutes, though they are to be construed strictly, are yet to receive such a construction as will conform to the manifest intention of the legislature and avoid an absurdity.

Thus in an indictment upon *St.* 1814, *c.* 175, forbidding any person to dig up a human body, "not being authorized by the selectmen of *any* town in this Commonwealth," it was *held* sufficient to aver, that the defendant was not authorized by the selectmen of the town where the body had been buried; this being according to the intention of the legislature.

THIS was an indictment upon the second section of *St.* 1814, *c.* 175.

The first section provides, "that if any person, not being authorized by the board of health, or the selectmen of any town in this Commonwealth, shall knowingly and wilfully dig up, remove or carry away, or aid or assist in digging up, removing or carrying away any human body, or the remains thereof," such person shall be imprisoned, &c.

The second section provides, "that if any person or persons knowingly and wilfully receive, conceal or dispose of any human body, or the remains thereof, which shall have been dug up, removed or carried away in the manner described in the first section of this act, he or they shall be subject to the same forfeitures and penalties," &c.

The third section is, "that all fines, accruing under this act,

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shall enure, one half to the informer, and one half to the town in which the offence is committed."

At the trial, which was before *Parker* C. J., it was proved by the government, that the defendant, on the night of November 17, 1828, went with a horse and wagon towards the com

371 mon burying-ground in Springfield, having a box in the wagon, which was procured by him; that one Perkins and one Moore went in the wagon with him and acted under his direction; that the dead body of the person mentioned in the indictment, which had been previously taken out of the grave in which it had been buried, the grave having been dug up for that purpose, was taken from the ground where it had been laid near the burying-place and covered over with leaves, by Moore, Perkins remaining in the wagon taking care of the horse, and was put into the box and the box covered and locked; and that the wagon was then driven over the bridge, where it had been agreed by the defendant he would meet Perkins for the purpose of conveying the body to Pittsfield. There was no proof that the defendant was at the graveyard at the time when the body was taken and put into the box, or that he assisted in that act; but it was fully proved that Moore and Perkins acted under his authority and by his direction.

It was objected by the defendant, that the evidence proved that the body was dug up and removed by him, as much as that he concealed or disposed of it; so that the offence was under the first section of the statute: And further, that the facts proved did not show such an offence as is described in the second section. Both of these objections were overruled. The defendant, being convicted, moved for a new trial.

The defendant also moved in arrest of judgment, because the indictment did not allege that the disinterment was not authorized "by the board of health, or the selectmen of *any* town in this Commonwealth." The allegation was only, that it was not authorized by the board of health or selectmen of the town of Springfield.

Sept 18*th*. *J. H. Ashmun*, for the defendant. The statute creates two distinct offences; one is, digging up, removing or carrying away a dead body, or assisting in digging up &c.; the other, in receiving, concealing or disposing of a dead body. The re-

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ceiving of the body must be by a person who did not dig it up. The evidence shows an offence under the first section, and if the defendant is guilty under that section, he cannot be under the second. If he is convicted and sentenced, or acquitted, under this indictment, he may still be indicted under the first section and convicted upon this same evidence. Perkins and Moore were the agents of the defendant; he was the principal; if he received by them, he gave by them; and there could not be an offence under the second section. [*Wilde* J. The indictment does not allege that Moore and Perkins dug up the body, but that it was by persons unknown.] But the jury would infer that it was dug up by Moore and Perkins.

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The defendant however relies with more confidence upon the motion in arrest of judgment. The indictment does not pursue the statute. There is nothing in the statute that implies that the consent of the selectmen of the town where the body was buried, should be obtained; the words are, "*any* town in this Commonwealth." Whatever may have been the intent of the legislature, there is nothing in the statute itself restraining it to narrower limits than these. It may be suggested, that the statute will not effect its purpose; but it is not for the Court to say what the legislature intended, except so far as they can determine it from the words of the act. The terms of this statute are so express and unambiguous, that there is no room for construction. 2 Rutherf. Inst. 307; Vattel, *bk.* 2, *c.* 17. But if there were any thing ambiguous, still, being a penal statute, it must be taken according to the strict letter, in favor of the subject. 1 Bl. Com. 88, and Christian's notes, 19, 20; 2 Hawk. *c.* 25, § 103; 1 Swift's Syst. 50; 1 Hawk. *c.* 70, § 26. In *Daggett* v. *Connecticut*, 4 Connect. R. 60, where the statute prohibited the erection of wooden buildings in New Haven, having in them a chimney, and the party erected such a building with the chimney entirely *outside* of it but looking into it and fitted solely for its accommodation, it was held that the statute did not apply to the case. In *United States* v. *Sheldon*, 2 Wheaton, 119, *driving* oxen to Canada during the war, was held not to be within the statute against "*transporting*" articles of provision "in any wagon, cart, sleigh, boat *or otherwise*." By 14 Geo. 2, *c.* 6, stealing

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sheep *or other cattle* was made felony; but it was held that the words, *or other cattle* meant nothing. 1 Bl. Com. 88. So of the words *or any other way*, in the Connecticut statute against killing bastard children "by drowning or any other way." Swift's Syst. 50. In *Commonwealth* v. *Carrol*, 8 Mass. R. 490, *breaking and entering in the night-time* a warehouse, with intent to steal, &c. was held not to be within the provision, that if any person "shall *in the night-time enter, without breaking*, or *in the day-time break and enter*," &c and yet no one can doubt that the legislature intended to provide against breaking and entering in the night-time. See also *United States* v. *Gooding*, 12 Wheaton, 476, 477; *Paulina's Cargo* v. *United States*, 7 Cranch, 60; *United States* v *Wiltberger*, 5 Wheaton, 95; Com. Dig. *Parliament*, *R* 20 The defendant is not to be told that the consequences of his construction of the statute may be injurious to the community. The legislature, upon seeing the deficiency in the statute, may provide for future cases.

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Davis (Solicitor-General), for the Commonwealth, cited 1 Bl. Com. 88, 89, 91, Christian's note, 21; Bac. Abr. *Statute*, *I*, 9; *United States* v. *Gooding*, 12 Wheat. 476; *Paulina's Cargo* v. *United States*, 7 Cranch, 60; Com. Dig. *Parliament*, *R* 10. *b*.

Bates, in replying, insisted that a conviction under the second section would not be a bar to an indictment under the first.

A conviction on an indictment for manslaughter is a bar to an indictment for murder, because there only one act is done. Here digging up the body is one act, and receiving it is another; like the stealing of goods, and the receiving of them when stolen.

The statute is not incapable of being enforced, upon the defendant's construction. The indictment may negative that *any* town gave a license to dig up the body, and this may be proved; and though it would be attended with inconvenience, yet that is no reason for giving a construction contrary to what is enacted in express terms. It is asked what authority has one town to license disturbing a grave in another. We answer, none but what the legislature have given it. If the statute means a disinterment not authorized by the selectmen of the town where the body was buried, the indictment might have

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pursued the words of the statute, "not being authorized by the selectmen of *any* town," and then proof that there was no license from the particular town would sustain the averment; but it clearly would not.

Sept. 19th.

PARKER C. J. delivered the opinion of the Court. The question in this case arises from an unfortunate obscurity in the terms of the statute on which the indictment is founded. Taken strictly, without reference to the subject matter and the manifest intention and object of the legislature, it would appear, that in order to sustain an indictment on the statute, it must be averred and proved that the board of health or selectmen of no town in the Commonwealth had given license to do the act complained of. The consequence would be, as oral testimony alone can be admitted on criminal trials, of facts proveable by witnesses, that the officers of every town, to the number of three or four hundred, must be summoned and give their personal attendance in the court where such prosecution is pending. We hazard nothing in saying that the legislature never intended such an absurdity.

But it is said that penal statutes admit of no latitude of construction; that they are to be taken strictly, word for word, let the consequences be what they may. It is true it is so laid down as a general rule, and the reason is, that the Court shall not be allowed to make that an offence which is not so made by the legislative enactment. But the rule does not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity which the legislature ought not to be presumed to have intended. There are cases which show this, although precedents would not be required to sustain so reasonable a doctrine. Bac. Abr. *Statute I*, 9; *Heydon's case*, 3 Coke, 7; *Rex* v. *Gage*, 8 Mod. 65; Plowd. 86; and *The Soldier's case*, Cro. Car. 71, — all of which are cited by Bacon, — go to show that even penal statutes, though to be construed strictly, as the general rule, yet are to receive such a construction as will conform to the intention of the legislature; some of them are stronger cases than this.

This statute has been in operation twelve or thirteen years, during which time there have been many prosecutions under it, which have been defended with great zeal by eminent counsel

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and yet the defect now suggested has never before been presented. This shows that the common understanding of the profession has been, that the words of the statute in regard to a license from the selectmen of *any town*, had reference to the town within which the offence was committed. And there is reason for this in the statute itself, for it is obvious that the legislature considered the offence, though of a public nature, to be particularly injurious to the community or town where repositories for the dead had been violated. How strange it would be, that a man indicted for breaking up a graveyard in Springfield on Connecticut river, and rifling it of dead bodies, should produce a license from the selectmen of Provincetown, at the extremity of Cape Cod, as a justification for the act; and yet this would be a good defence, upon the construction of the statute demanded in support of this motion. By the last section of the statute it is provided, "that one half the penalty or fine shall enure to the town within which the offence is committed." This shows that the legislature contemplated towns as more specially interested in the prosecution, and may serve to show their intention in the phrase *any town in the Commonwealth*, when providing for a license or authority to do the act.

It was objected to the verdict in this case, that the evidence reported proves that the defendant was guilty of digging up &c the body, so that his case is within the first section of the statute; whereas he is charged only on the second section, with receiving, concealing and disposing of it; which is founded upon the act of digging up &c. being done by another. The testimony had a tendency to prove that the breaking up the grave and removing the body were by Moore and Perkins, who appear to have been employed by the defendant; but it was not decisively proved that they did the act. The evidence went no further than to show, that the body having been dug up and removed from the grave, outside the burying-ground, where it was covered by leaves, it was taken from this place of concealment by the defendant's order, and under his control was carried off. The case then is very clearly within the second section of the statute. *Motions overruled.*[1]

[1] See Revised Stat. c. 130, § 19; *Commonwealth* v. *Cooley*, 10 Pick. 37.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN, SEPTEMBER TERM 1829, AT NORTHAMPTON.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON MARCUS MORTON, }

SAMUEL LISCOMB *et ux. versus* LUTHER ROOT.

Where one in possession under a tenant in dower held over after her death and purchased the shares of some of the reversioners and continued in the exclusive possession, but without manifesting an intention to oust the other reversioners, it was *held*, that his possession was according to the title, and that these reversioners might maintain a petition for partition.

The respondent in a petition for partition cannot avail himself of *St.* 1807, *c.* 75, (the *betterment act*,) which allows the tenant, in certain cases, the benefit of improvements made by him upon the land.

THIS was a petition for partition of certain land, whereof the petitioners alleged themselves to be seised as tenants in common, namely, Samuel Liscomb and Abba his wife, in her right, of one twentieth part, and Charles A. Thomas, the other petitioner, of one twentieth part.

The respondent, by plea, denied the seisin of the petition-

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ers ; and issue being joined thereon, the cause was tried before *Parker* C. J.

The petitioners proved, that about fifty years ago, Jacob Gibbs was seised of the land, and died so seised, leaving a widow, one son and three daughters. One of the daughters died in 1812, leaving four children, of whom two were Abba Liscomb and Charles A. Thomas. After the death of Jacob Gibbs, the land was set off to his widow as her dower, and was occupied by her as such until her death, which took place in 1816 ; at which time the respondent was in possession as her lessee.

The respondent insisted in his defence, that the petitioners were not so seised as to be entitled to maintain this process, he having been in the actual and exclusive possession from the death of the widow to the time of the trial, having made improvements on the land.

The respondent also filed a claim to a valuation of the land and of the improvements, in order to avail himself of the benefit of *St.* 1807, *c.* 75, if that statute could be executed under this process. The parties determined the value of the land and of the improvements, by an agreement, which was to have the same effect as if the value had been found by verdict.

If the evidence of seisin of the petitioners was competent to prove that fact, the respondent was to be defaulted, and judgment to be rendered for partition ; unless the respondent could avail himself of the statute of 1807 ; in which case such proceedings were to be had as the Court should deem lawful and proper.

Sept. 21st. *Bates*, *Dewey* and *Marcey*, for the respondent, cited *St* 1807, *c.* 75, § 3, and they contended that a petition for partition was "an action for the recovery of land," within the meaning of that statute. It is a substitute for the writ of partition. *St.* 1783, *c.* 41 ; 1786, *c.* 51. The incidents of an action at law, as giving notice to the adverse party, joining issue, trial by jury, costs, &c. belong to this process. It may be objected that no writ of seisin can issue, and so the remedy given by the statute of 1807 cannot be pursued ; but is not the writ directing the commissioners to set off the petitioner's share similar to writ of seisin ? An entry may be made on the record, that

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the petitioner shall not have the land unless he will pay for the improvements. May there not be a conditional judgment, that the commissioners shall set off so much as is equivalent to the petitioner's share before the improvements were made? In *Bacon* v. *Callender*, 6 Mass. R. 303, the demandant might have brought a petition for partition and thus evaded the betterment act, if the mere change in the form of action is to affect the rights of parties.

They also urged, but without great confidence, that the petitioners had not shown a seisin sufficient to maintain this process.

J. H. Ashmun, contrà, cited on this last point, *Barnard* v. *Pope*, 14 Mass. R. 434.

Sept. 24th

PARKER C. J. delivered the opinion of the Court. In regard to the first question, we think a sufficient seisin is shown to entitle the plaintiffs to maintain this process. It is only when actually ousted, or when there is an avowed adverse possession, that one claiming to be tenant in common is driven to an entry or an action for possession, before he can have partition. In this case the respondent did not hold possession adversely to the title of the petitioners. He first occupied under the tenant in dower, and after her death held over, without manifesting an intention to abate the heirs of the former owner. His possession is to be construed to be according to his rights, he having purchased of some of the heirs; and his possession is for the benefit of the cotenants, he not having signified an intention to oust the heirs.[1]

And in regard to his claim under what is commonly called the betterment law, it cannot be sustained; because it does not appear to have been the intent of the legislature to apply that remedy to any cases but those, in which the defendant in the suit had originally entered without title, and held possession six years before the commencement of the suit, adversely to the right owner.

Besides, it is impossible to execute the provisions of that act under this process. The judgment here is for *partition only*; and the execution of the judgment is the setting off the

[1] See *Miller* v. *Dennett*, 6 N. Hamp. R. 109.

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property belonging to the petitioner. Whereas under the betterment law, there is an election for the demandant; and an execution for money, if he so elects.

Judgment for partition.

379 ELISHA PUNDERSON *et al. versus* THOMAS SHEPHERD.

Where the plaintiffs agreed to perform work for the defendant upon a canal, and the defendant agreed to make payments "from time to time by certificates from the engineer as the work advances," it was *held*, that the plaintiffs might bring an action without having given notice to the defendant of a certificate previously made, each party being bound to take notice.

THIS was an action of covenant on an indenture made between the plaintiffs and the defendant, dated December 11, 1826. The plaintiffs agreed to construct, by the 1st of December, 1827, that part of the Hampshire and Hampden canal included in the defendant's contract with the canal corporation, to the acceptance of Davis Hurd, or the principal engineer &c.; in consideration of which the defendant agreed to pay them after certain rates specified in the indenture, "the payments to be made from time to time by certificates from the engineer as the work advances, always reserving twenty-five per cent for the faithful fulfilment of the contract; two thirds in cash, and one third in stock of the Hampshire and Hampden Canal Company, and when any one of said sections is completed, the whole of the payment for said section is to be made to the party of the first part." The engineer made out a certificate, dated November 1, 1827, of the work then done, but it was not proved to have been shown to the defendant before the writ was sued out, which was on November 24, 1827. A verdict was found for the plaintiffs.

Sept. 2. *st.*

Dewey, for the defendant, contended that the action would not lie except after a presentation to the defendant of the engineer's certificate, or at least notice that such certificate had been given.

Strong and *J. H. Ashmun*, *contrà*, said that the plaintiffs were not bound to present the certificate or give such notice; that making the certificate was the act of a third person, of

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which each party was bound to take notice; as in the case of an award. Com. Dig. *Pleader*, C 75; 2 Wms's Saund. 62 *a*, note 4. Punderson v. Shepherd.

And of this opinion were the Court. *Sept. 24th.*

The Inhabitants of SOUTHAMPTON *versus* The Inhabitants of EASTHAMPTON. 380

The assessment of half a poll tax upon an individual, *it seems*, is illegal.

Where a town voted in March to raise a sum of money for highways, and in April the selectmen, being also assessors, handed to each surveyor of highways a paper directing him to repair certain highways and apportioning a certain sum upon individuals within his district, according to the valuation of the preceding year, and stating the rates at which labor upon the highway should be estimated, and individuals worked upon the highways without reference to the sums against their names respectively, the surveyor keeping an account of the work performed, it was *held*, that this was not a legal assessment of a highway tax; so that labor performed by an individual to the amount of the sum set against his name, would have no effect towards giving him a settlement.

ASSUMPSIT to recover a sum of money expended by the plaintiffs in the support of Noah Kentfield, a pauper.

It was agreed that before 1810 the pauper had his settlement in Easthampton, and that he had since resided ten years in Southampton, and the question was, whether he had paid "all State, county, town or district taxes duly assessed on his poll or estate, for any five years" within that time, so as to have gained a settlement in Southampton according to the twelfth mode in *St.* 1793, *c.* 34.

Kentfield paid the taxes in Southampton for the years 1812, 1813, 1814 and 1815; but in 1815 his tax was for only half a poll.

It appeared by the records of Southampton, that in March, 1816, the town voted to raise 300 dollars for the support of highways. In April following, Sheldon, Strong and Lyman, being selectmen and assessors, put into the hands of A. Searl, who was one of the surveyors of highways, a paper signed by them as selectmen, and directed to Searl, which was as follows: — "Tax $ 23·87. Sir, You will repair the road from &c. Terms of labor, till October, 75 cents, in October 58, after that 41.

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Southampton v. Easthampton.

Arunah Searl - - - - - - - $1,17
(The paper has a credit to Searl of $7,22.)
Azariah Gladden - - - - - - - ,15
Credit, Oct. by half day's work - - - ,29
Thomas Gladden - - - - - - - ,31
381 Noah Kentfield, - - - - - - - ,17
Credit, June, by part of half day - - - ,17."

The paper contained several other names, the total of the sums annexed to them amounting to $23.87. It was admitted that the credit to Kentfield was given correctly.

It was agreed, if parol evidence to this purpose was admissible, that according to the usual course of proceeding adopted by Southampton, the sum of money voted at their annual March meeting for the support of highways was soon afterward apportioned by the selectmen, who were also assessors, according to the next preceding valuation, among such of the inhabitants as were supposed to be liable to be taxed, though not with any great care that the apportionment should be entirely accurate; that papers similar to the one before described were by them put into the hands of the different surveyors, containing the names of the inhabitants supposed to be taxable within their respective districts, and the sum so apportioned to each of them; that each person named therein worked upon the highways or not, as he pleased, and subject to the discretion of the surveyor, without much regard to the amount of his apportionment, the surveyors keeping an account of the work performed; and that at about the close of the year a tax-bill was made out, including therein all sums of money raised by the town, as well for the support of highways as for other purposes; when those persons who had thus labored upon the highways, or had other claims against the town, were allowed for their work and other claims in a general credit bill. The paper first mentioned was such an apportionment of the sum so voted for highways in 1816, and the general credit bill for 1816, bearing date March 10, 1817, contains the name of Kentfield, with an allowance of 17 cents. But neither did the general tax-bill of 1816, bearing the same date with the general credit bill last mentioned and embracing all the moneys voted by the town in 1816, whether for highways or other

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purposes, contain any tax against Kentfield, nor was his name on the valuation of that year.

It was further agreed, that the collector of taxes for 1816, in the settlement of his tax-bill, had the benefit of all allowances on the general credit bill for that year, and that the sum of 17 cents allowed to Kentfield was thus received by the collector from the town; that he supposed he had paid it over to Kentfield, but not finding it receipted on the bill, he had recently, and since the present question has been raised, but without the knowledge or direction of the agents of the town, paid over the sum to Kentfield, with annual interest. 382

The defendants were to be defaulted or the plaintiffs to become nonsuit, according to the opinion of the Court.

Bates and *Dewey*, for the plaintiffs. The assessment of *half* of a poll tax in 1815 was illegal and void. *Sept. 21st.*

The paper made out in April, 1816, was not a highway tax, and the work on the highway was not performed in reference to it as a tax. A voluntary payment of a sum not regularly taxed does not come within the statute of 1793, *c.* 34.

But if it was a tax, as it was founded on the valuation of the preceding year, it is void considered as a tax for 1816. *Nason* v. *Whitney*, 1 Pick. 140. Being however voted and assessed before May, 1816, it was a tax for the year 1815.

Strong and *Forbes*, for the defendants. A highway tax is not paid like other taxes; it is paid in labor. *St.* 1786, *c.* 81, § 3; *St.* 1796, *c.* 58, § 4. As the sum of 300 dollars was voted in 1816, it must be considered as a tax for that year. The *St.* 1786, *c.* 81, is silent as to the valuation upon which a highway tax is to be assessed. Towns may raise money for repairs of highways, at any meeting regularly warned, and the assessment here had reference correctly to the valuation of 1815.

But the *St.* 1793, *c.* 34, in saying "taxes duly assessed," does not mean *legally*, but *fitly* assessed; the propriety or fitness of which is recognised by the person against whom the tax is intended to be enforced. Here the fitness has been acquiesced in by the pauper, and the tax was paid by him.

Besides, it is against public policy to allow towns to avail themselves of the fraud or incapacity of their officers. It was

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the intention of the assessors to make a regular highway tax, and they considered that it would be the same thing if they included the bill of expenses in the general tax-bill, instead of having a separate column for a highway tax; whereby they made the general tax illegal. It is not competent to the plaintiffs to say they made an assessment in 1817 embracing this highway tax as well as other town charges. If a man were assessed higher in the assessment of 1817, than in the paper given to the surveyor, he would be denied the privilege of paying his highway tax in labor.

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The plaintiffs had evidence of the pauper's ability to pay the highway tax, for he actually paid it; and to omit his name in the tax-bill made out in 1817, was a legal fraud, which will not avail the plaintiffs. *Wrentham* v. *Attleborough*, 5 Mass. R. 430.

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Per Curiam. The tax for 1815 is objected to, because it was only upon half a poll. It is said there cannot be a poll tax for less than a poll; and this seems to be reasonable, but as it is obvious that what is called an assessment in 1816 was illegal, it is not necessary to determine that point. The word *tax* in the paper delivered to the surveyor is the only thing in it which would lead one to suspect it was meant for a tax. It was not founded on a valuation of 1816, and cannot be a legal tax for that year.[1] It is said, however, that the plaintiffs are not to be permitted to show its illegality, as it was the act of their own officers. We need not decide that question, as we are satisfied this was not intended to be an assessment of a tax. It was merely an apportionment of a sum on individuals in the surveyor's district according to the taxes of a former year, and they performed labor without reference to the sums set against their names, and had credit for it, and it was afterwards carried into the general credit bill with other claims against the town, and was allowed to the collector in the settlement of his tax-bill. The town never had the benefit of it. The pauper therefore has gained no settlement in Southampton by the payment of taxes.

The defendants say however, that as the pauper paid 17

[1] See *Waldron* v *Lee*, 5 Pick. 323; *Granger* v. *Parsons*, 2 Pick. 392.

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cents, it was evidence of his ability to pay. But if he was liable at all, he should have been assessed for all the other taxes of 1816. And it is contended that the omission to tax him was fraudulent in law. But as he was able the year before to pay only half of a poll tax, there seems to be but a slight foundation for that suggestion. If there were a question of fraud, it should be tried by the jury; but under the circumstances of the case we think there is no ground for a new trial.

Southampton v. Easthampton.

JENNETT MILLER *versus* DANIEL PARISH. 384

An action of slander lies for charging an unmarried female with having committed fornication.

A declaration in slander, after averring a colloquium concerning the plaintiff and A, charges the defendant with saying that A thinks it a hard matter to commit fornication with "his niece (meaning the plaintiff.)" This was *held* sufficient, without any averment that the plaintiff was A's niece.

THIS was an action of slander. The declaration contained five counts. The jury found the defendant guilty as to the *first*, *third* and *fifth*. The defendant moved in arrest of judgment on the ground of the insufficiency of the three counts above specified.

The *first* count, after averring a colloquium concerning the plaintiff and Hiram Bagg, charges the defendant with speaking the following words, to wit: "Bagg (meaning the said Hiram) thinks it a hard matter for any one to have intercourse with (meaning to commit fornication with) his niece (meaning the said Jennett); but I know; (meaning that he the said Parish had committed fornication with her the said Jennett.)"

The *third* count was for different words, but amounting to a similar charge of the plaintiff's having committed fornication with the defendant.

The *fifth* count was a general one, which averred that the defendant had publicly accused and charged the plaintiff with having committed the crime of fornication.

J. H. Ashmun, for the defendant. An action of slander does not lie for charging the plaintiff with the crime of fornication. At common law no action lies for such a charge. And

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the statute of 1785, *c.* 66, which makes fornication a criminal offence, does not alter the common law in this respect, because the punishment which it provides, the payment of a fine, is not an infamous punishment. And though the woman who commits this offence is liable to be committed to prison or the house of correction, if she does not pay the fine, this does not change the character of the punishment. The punishment does not differ from that of assault and battery; yet it will not be pretended, that to charge one with having committed an as-

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sault and battery is actionable. In New York it is held not to be actionable to charge a woman with being a common prostitute. *Brooker* v. *Coffin*, 5 Johns. R. 188.

The first count is bad, because it does not contain a direct averment that the plaintiff was Bagg's niece. 1 Chit. Pl. 381; *Gidney* v. *Blake*, 11 Johns. R. 54; *James* v. *Rutleck*, 4 Coke, 17; *Foxcroft* v. *Lacy*, Hob. 89; *Van Vechten* v. *Hopkins*, 5 Johns. R. 211; 1 Vin. Abr. 530; *Slocomb's case*, Cro. Car. 442.

The third count is bad for its generality.

Bates, for the plaintiff, contended that an action lay for charging a female with having committed fornication, and cited *Woodbury* v. *Thompson*, 2 N. Hamp. R. 194; *Frisbie* v. *Fowler*, 2 Connect. R. 707; *Bloss* v. *Toby*, 2 Pick. 327, 328.

The first count is sufficient, especially after verdict. *Wilner* v. *Hold*, Cro. Car. 489; Stark. on Sland. 298; *Shalmer* v. *Foster*, Cro. Car. 176.

Sept. 24th.

PARKER C. J. delivered the opinion of the Court. It is objected, that a false and malicious charge of fornication against a female will not sustain an action of slander, because fornication is not a crime at common law, and is not punishable by statute with ignominious punishment. We do not think that the objection is valid; for whenever an offence is charged, which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable.

It seems to have been determined otherwise in New York, as in *Brooker* v. *Coffin*, 5 Johns. R. 188, though such a case

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falls within the rule for supporting such actions, as stated by the judge who delivered the opinion. Miller v. Parish.

It has always been the law in this Commonwealth, and is so held in New Hampshire and Connecticut. *Woodbury* v. *Thompson*, 2 N. Hamp. R. 194; *Frisbie* v. *Fowler*, 2 Connect. R. 707.

It is objected also, that the first count is defective in not averring distinctly, that the plaintiff was a niece of Hiram Bagg; and that, as the damages are general upon all the counts, judgment must for this cause be arrested. But we think the count sufficient. There is a colloquium of and concerning the plaintiff, and of and concerning one Hiram Bagg; and then it 386
is averred, that the defendant, speaking of the plaintiff, said, "Hiram Bagg's niece." This is quite sufficient for common understandings; and indeed it requires a great stretch of technical ingenuity to raise a doubt of the person intended.

This hypercriticism in actions of slander was carried much beyond the bounds of common sense in former times. The struggle used to be, to find, if possible, some way of avoiding a natural and necessary inference. At present, a distinct averment in regard to the person spoken of, and a clear reference of the calumnious words to that person, is all that is required, without multiplying averments and innuendos, so as to obscure instead of throwing light upon the subject of investigation. Starkie on Slander, 285, 298.

Judgment according to verdict.

ISAAC G. CUTLER *versus* ADOLPHUS DICKINSON.

The obligors in an administration bond are estopped by it to deny that the principal was appointed administrator.

An absolute deed of land made by the principal in an administration bond to a surety, the grantor taking back a writing, not under seal, for a reconveyance upon the grantee's being saved harmless upon the bond, is not *per se* fraudulent as against creditors of the grantor.

TRESPASS *quare clausum fregit*. The plaintiff claimed a title by virtue of a levy upon the land as belonging to Andrew Hyde, for a debt due before January 6, 1826. The defendant

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Cutler v. Dickinson.

claimed the land under a deed from Hyde, dated on that day; and the question was, whether this deed was made *bonâ fide* and for a valuable consideration.

The defendant proved that a part of the consideration was a debt due to him from Hyde, of about 187 dollars. The value of the land was estimated by witnesses at more than 300 dollars. The defendant further offered, as evidence of consideration, a copy of a bond given to the judge of probate by Hyde as principal and by the defendant and one Scott as sureties, in a large penal sum, conditioned for the faithful performance
387 by Hyde, of the duties of an administrator on the estate of one Eastman; and the defendant proved that there was an inventory, of the amount of 267 dollars, returned by Hyde, and that Hyde had received 218 dollars from other sources, and had paid 100 dollars; but it appeared, upon examining the records of the probate office, that there was no decree, nor any other evidence of the appointment of Hyde as administrator, except what results from the bond.

It was contended by the plaintiff, that there was no liability on the part of the defendant as surety in the bond, and the bond therefore could not be regarded by the jury in deciding the question as to the sufficiency and legality of the consideration of the deed. But *Putnam* J. ruled that the bond was a legal and valid bond, and that it furnished a valuable consideration for the conveyance.

The jury found a verdict for the defendant. If the direction was wrong, a new trial was to be granted.

It was admitted at the argument, that the defendant had given Hyde a promise in writing, which was not under seal and not recorded, for a reconveyance of the land, when the defendant should have received payment of his demand, and have been saved harmless from his liability on the bond.

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Dewey, for the plaintiff, insisted that the defendant was not liable on the bond, because there was no decree appointing Hyde administrator. Every probate decree must be recorded. *Chase* v. *Hathaway*, 14 Mass. R. 226. The obligor may show that the obligee had no right to take the bond. Bail are not estopped to say that no writ issued against the principal. But if there was a legal appointment, the contingent lia-

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bility of the surety was not a sufficient consideration for an absolute conveyance. The transaction is fraudulent *per se* against creditors. A party will not be allowed to put his property out of the reach of his creditors in this manner. The bond may continue in force for more than twenty years. The defendant would not be answerable under the trustee process for the surplus not required for his indemnity. *How* v. *Field*, 5 Mass. R. 390.

Ashmun and *Baker*, *contrà*. The defendant would be estopped by the recital in the bond, to deny that Hyde was duly appointed administrator. *Paramour* v. *During*, Moor, 420; 388
Willoughby v. *Brook*, Cro. Eliz. 756; *Rainsford* v. *Smith*, Dyer, 196; *Hosier* v. *Searle*, 2 Bos. & Pul. 299. The transaction is not fraudulent, for the verdict finds it to be morally honest, and the trust is good; *Northampton Bank* v. *Whiting*, 12 Mass. R. 110; and a trust estate cannot be taken on execution.

Per Curiam. The obligors would be estopped by the recital in the bond, to deny the appointment of the administrator;[1] and the bond therefore formed a valid consideration for the deed, which was given as an indemnity against the defendant's liability on the bond. The contract to reconvey showed the purposes of the deed, and though it was not a bond of defeasance, yet it would enable the grantor to compel a reconveyance by a bill in equity. There was no conclusive evidence of the deed's being fraudulent, and the verdict is not to be disturbed.[2] *Sept. 24th*

Judgment according to verdict.

[1] See *Cordis* v. *Sager*, 14 Maine R. (2 Shepley,) 477.

[2] See *Reed* v. *Woodman*, 4 Greenleaf, 400. In New Hampshire an absolute conveyance made for the purpose of securing a debt, with an understanding between the parties, that the land is to be reconveyed upon payment of the debt, is void as against creditors. *Smith* v. *Lowell*, 6 N. Hamp. R. 67.

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The Inhabitants of WARE *versus* The Inhabitants of WILLIAMSTOWN.

A notice by overseers of the poor, that expenses had been incurred for the support of "*the child* of Miss H. W., the daughter of T. W., who are *inhabitants* of the town of W," was *held* sufficient to sustain assumpsit against such town.

ASSUMPSIT to recover expenses incurred in the support of George W. Stephens, an infant and an illegitimate child of Harriet Wright, alleged to have its settlement in Williamstown.

At the trial in the Common Pleas, the plaintiffs offered in evidence the notice given by the overseers of the poor of Ware to the overseers of the poor of Williamstown, in which it is said, — "There is a considerable expense incurred for the support of the child of Miss Harriet Wright, the daughter of Timothy Wright, who are inhabitants of Williamstown, and the same of whom we notified you by letter of May 10, 1826. You are requested to pay said expense and provide for the further
389 support of the above named persons." No evidence was offered as to the letter of May 10th. The defendants objected to this notice, that it does not describe the pauper with sufficient particularity, and that it does not allege that the pauper has a settlement in Williamstown. The pauper was six or seven months old at the time of giving the notice, and was known by the name of George Washington Stephens. The court overruled the objections, and a verdict was found for the plaintiffs The defendants filed exceptions.

Sept. 21st. *Dewey*, in support of the exceptions. The notice does not give the name, sex or age of the pauper. *Beaston* v. *Scisson*, 1 Str. 114; Comb. 478; 3 Burn's Just. (16th ed.) 569; *Embden* v. *Augusta*, 12 Mass. R. 307; *Shutesbury* v. *Oxford*, 16 Mass. R. 102; *Walpole* v. *Hopkinton*, 4 Pick. 358.

The notice ought to have alleged that the pauper had its settlement in Williamstown. Even if it had been called an *inhabitant*, the notice would not have required an answer, but the word "inhabitants" applies only to Harriet and Timothy Wright.

Ashmun, *contrà*, cited on this last point, *Quincy* v. *Braintree*, 5 Mass. R. 86; and he said that in the expression "who

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are inhabitants," *who* refers to the child as one of the antecedents.

Ware v. Williamstown.

Per Curiam. The defect of the notice in the cases cited consisted in its generality. "The family" of A. B. is altogether indeterminate as to age, sex or number. It imports more than one, but gives no intimation of the provision necessary for their support or removal. The notice in this case is limited to one object, "the child of Miss Harriet Wright"; so that no risk would be incurred of taking the wrong person, for the notice imports that there was but one.[1]

Sept. 25th.

Saying that the parent and her father were inhabitants of Williamstown, is equivalent to saying they had their settlement there.

Judgment for the plaintiffs.

DANIEL DONELSON *versus* EBENEZER TAYLOR. 390

The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents.

Whether the loss of a paper is sufficiently proved to let in secondary evidence of its contents, is a question for the court.

If the testimony of a witness is inadmissible to prove such loss, by reason of his being interested in the suit, and his being interested is known to the party against whom he is called to testify, he must be objected to before he is sworn and examined, or the objection will be too late.

ASSUMPSIT upon a promissory note made by the defendant, payable to the plaintiff or order.

At the trial, before *Parker* C. J., it appeared, that the note was used at the trial in the Common Pleas, but the case was taken from the jury and brought up by demurrer. It having been suggested by the plaintiff's counsel, that the note had not been seen by any one since the trial in the Common Pleas, the judge admitted the affidavit of the plaintiff to show that it was not in his possession, and that he did not know where it was, and then allowed him to give such evidence as he could of the loss.

[1] See *Chicester* v. *Pembroke*, 2 N. Hamp. R. 530; *Dover* v. *Paris*, 5 Greenleaf. 430; *Orange* v. *Sudbury*, 10 Pick. 22; *Uxbridge* v. *Seekonk*, 10 Pick. 150.

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Donelson v. Taylor.

It appeared from the evidence of the clerk of the court and of the counsel in the case, that the note was read to the jury at the trial in the Common Pleas, that it agreed with the description of it in the writ, that it was not then suggested that there was any variance between the note and the declaration, and that the defence made was founded on the existence of the note. It also appeared from the testimony of the plaintiff's counsel, that they had not seen the note since the trial in the Common Pleas.

Isaac B. Barber, the attorney who filled the writ, testified, that he drew the writ from the original note then in his possession, that he brought it with him to court, where it was used on the trial in the Common Pleas, that he had searched among his papers and could not find it, and that he had not seen it since the trial. After he had given this evidence, it was objected that he was not a competent witness, having indorsed the writ. The judge, however, considered the evidence as proper for the Court to act on, in determining whether the plaintiff should be allowed to go to the jury without the production of the note.

391 No defence being made to the note, the judge informed the counsel, that he should instruct the jury that on this evidence they ought to return a verdict for the plaintiff, and that judgment would be rendered thereon for the plaintiff on his giving a sufficient bond of indemnity to save the defendant harmless from any future claim on the note. Whereupon the defendant consented to be defaulted, reserving for the whole Court the question, whether the evidence was sufficient and conclusive, without any thing to contradict it, to prove the loss of the note, and to entitle the plaintiff to recover without producing it. And judgment was to be rendered for the plaintiff on his filing the bond, if this proceeding is right; otherwise the default was to be taken off and a new trial granted.

Sept 22d. *Wells*, for the defendant, contended that the evidence of he plaintiff and of the indorser of the writ were not admissib. to prove the loss of the note. *Coleman* v. *Wolcott*, 4 Day, 388. If Barber was admissible to prove the loss, he was not to prove the contents of the note. *Jackson* v. *Frier*, 16 Johns. R. 193. The evidence of the loss of the note was not sufficient; it does not appear that any search has been made for

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it, on the files of the Court of Common Pleas. 1 Stark. Ev. 349, 350; *Jones* v. *Fales*, 5 Mass. R. 101; *Jackson* v. *Hasbrouck*, 12 Johns. R. 192. [*Parker* C. J. The whole inquiry was grounded on the supposition that it was not to be found on the files.]

The evidence of the loss was not conclusive, but should have been left to the consideration of the jury.

Ashmun, for the plaintiff, cited *Taunton Bank* v. *Richardson et al.* 5 Pick. 436; *Davis* v. *Spooner*, 3 Pick. 284; [2d edit. 286, note 1; *Poignand* v. *Smith*, *ante*, 272.]

Per Curiam. There appears to have been sufficient evidence that the note was lost, to let the plaintiff in to prove the contents. The affidavit of Donelson was properly received, in order to satisfy the Court that the note was not in his possession nor anywhere within his control. The evidence of the loss was rightly directed to the Court. And as to the clerk's not saying he had searched his files, it ought to be taken as a fact that a search was made. His testimony would have been a fraud on the Court, if he had not looked among his files for the note. *Sept. 25th*

The testimony of Barber would have been rejected, if it had been offered to the jury, because his indorsement of the writ made him interested. But if his affidavit might not, like that of the plaintiff, have been received on a preliminary question to the Court, still the objection came too late, being after he was sworn and examined. This was a waiver of the objection, the evidence of his interest being within reach of the defendant's counsel when he was offered as a witness. 392

Judgment for the plaintiff.

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ANSEL PHELPS *et al. versus* WILLIAM TOWNSEND.

The defendant gives the plaintiffs a written contract, by which, after reciting that he places his son with the plaintiffs to learn the art of printing, "to stay till he is twenty-one years of age," the defendant agrees "in consideration of the son's being so old" (he was then eighteen), to pay the plaintiffs a stipulated amount if the son does not continue in the plaintiffs' employment six months after he is twenty-one. The son enters into the plaintiffs' employment in pursuance of the agreement, and is instructed by the plaintiffs in the art of printing, for some months, when he leaves the plaintiffs without cause. *Held*, that there was a sufficient consideration for the defendant's contract and that he was liable on it to the plaintiffs.

The want of a counterpart to such a contract does not render it invalid.

ASSUMPSIT upon the following contract.

"I the subscriber place my son David Townsend with Phelps & Clark to learn the art of printing, on these conditions; — 1st. The said David is to stay three weeks on trial; then, if both parties are suited, he is to stay till he is twenty-one years of age. In consideration of his being so old, I agree further, that I will pay said Phelps & Clark the amount of six months' work at 4 dollars per week, unless said David continues in their employ six months after he is twenty-one years of age. Greenfield, August 31, 1827. *William Townsend.* (Said David was eighteen years of age the 18th day of June, 1827.)"

The declaration averred that the plaintiffs received David as an apprentice on trial for three weeks, and afterwards, both parties being suited, they employed and instructed him as an apprentice, treating him like other apprentices, from August 31st, 1827 to February 8th, 1828, on which day he left their service without any cause; and that he refuses to stay in their service till he is twenty-one.

393 At the trial, before *Parker* C. J., the evidence proved the allegations in the first count; and it was admitted that the contract was in the handwriting of one of the plaintiffs, and that the defendant had no counterpart. But the judge was of opinion, that the written contract was not binding on the defendant, on the ground that there being no provision in t for the benefit of the plaintiff and his son, it was without consid-

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eration. A nonsuit was ordered, subject to the opinion of the whole Court.

Phelps v. Townsend. Sept. 22d.

Wells and *Grennell*, for the plaintiffs. The paper was in the handwriting of one of the plaintiffs, and their names were in it, which amounts to a signature by them; and they, having accepted the contract, were bound by it. 1 Pow. on Contr. 243; *Bret* v. *Cumberland*, Cro. Jac. 399, 522; *Ewre* v. *Strickland*, ibid. 240; 2 Stark. Ev. 606; *Goodwin* v. *Gilbert*, 9 Mass. R. 510; *Fletcher* v. *M'Farlane*, 12 Mass. R. 43. The plaintiffs were bound to instruct the son in the art of printing, and this obligation is a sufficient consideration for the defendant's contract. The consideration need not be expressed in the contract. The statute respecting apprentices, cannot prevent the defendant from entering into a contract in regard to his son. *Matter of M'Dowles*, 8 Johns. R. 253; *Mead* v. *Billings*, 10 Johns. R. 99; *Day* v. *Everett*, 7 Mass. R. 145.

R. E. Newcomb and *H. G. Newcomb*, *contrà*. The contract is void for want of mutuality. There was no consideration for the defendant's promise, for the plaintiffs were not bound to do any thing for the defendant or his son. The defendant could not sue the plaintiffs on this contract, supposing there was a neglect on their part to instruct the son as an apprentice. The act of the father, at common law, could not bind the son without the son's consent. 2 Kent's Com. 212; *The King* v. *Cromford*, 8 East, 25; *The King* v. *Arnesby*, 3 Barn. & Ald. 584. This paper, therefore, did not bind the son to serve or the father to pay. In consequence of the statute regarding apprentices, this contract is void. Reeve's Dom. Rel. 341. Even if papers had been signed and exchanged on both sides, the contract would be void. *Butler* v. *Hubbard*, 5 Pick. 250.

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Per Curiam. A nonsuit was ordered at the trial, the judge being then of opinion, that the written memorandum signed by the defendant was not sufficient to sustain the action, there being no obligation on the other party to do any thing which might form a consideration for the promise by the defendant; but we are all of opinion, that the acceptance of the contract by the plaintiffs and the execution of it in part by receiving

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Phelps v. Townsend.

the apprentice, created an obligation on their part to maintain and instruct the defendant's son. The want of a counterpart is not a valid objection. It might put the defendant to a disadvantage in regard to proof; but it does not affect the consideration. It is clear, that where one makes a grant to another, which is accepted, and by the instrument something is to be done by the grantee, the grantor may compel performance.

This is not a contract under the statute respecting apprentices, but a contract by a father for the services of his minor son, which he has a right to dispose of.

New trial granted.

Clarissa Dickinson, Appellant, &c. *versus* Pliny Arms.

An administrator's first account of his administration may be allowed by the Court of Probate, although not rendered until after the expiration of four years from the time of giving notice of his appointment.

The same person being administrator on the several estates of A and D, and the estate of D, which was solvent, being indebted to the estate of A upon a promissory note, the administrator, in his administration account of the estate of D, charged the amount of the note as paid by himself at a date more than four years after he had given notice of his appointment as administrator on that estate, with interest to that date. *Held*, that the date was not conclusive against him as to the time of payment, but that the law would presume he paid the note as soon as he had sufficient funds in his hands.

Held also, that he had no right to charge interest on the note after his liability to pay ceased.

This was an appeal from a decree of the judge of probate of Franklin county, allowing the first account of Pliny Arms, the appellee, as administrator on the estate of David Dickinson.

The appellee was appointed administrator in 1823. The estate was solvent.

395 The first reason of appeal was, because the judge allowed the sum of 321 dollars paid, on a note dated January 16, 1819, to the estate of Jonathan Arms, on October 14, 1828, being more than four years after the appellee had given notice of his appointment as administrator.

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The appellee was likewise administrator on the estate of Jonathan Arms.

The third reason was, because interest was allowed upon the note to October 14, 1828.

The fourth was, because the allowance of the account generally was erroneous, the appellee having presented and settled no administration account until after the lapse of four years after he gave notice of his appointment.

H. G. Newcomb, for the appellant. The intent of the statutes of 1788, *c.* 66, and 1791, *c.* 28, is, that estates shall be settled within four years after notice of the appointment of an administrator; and all demands against the intestate which have been payable, are lost, if not enforced within that period. This provision is for the benefit as well of the heirs as of the administrator, and cannot be waived by the administrator. *Scott* v. *Hancock*, 13 Mass. R. 162; *Brown* v. *Anderson*, ibid. 203; *Dawes* v. *Shed*, 15 Mass. R. 6; *Ex parte Allen*, ibid. 58; *Emerson* v. *Thompson*, 16 Mass. R. 429; *Royce* v. *Burrell*, 12 Mass. R. 395; *Heath* v. *Wells*, 5 Pick. 140. It may be objected, that the money was in the hands of the appellee and paid by him within the four years, he being the administrator upon both estates. The answer is, that by the entry in his account he has fixed the time of the payment; and he has cast the interest to October, 1828, which negatives the idea that the money was before that time assets in his hands as administrator on the estate of Jonathan Arms. *Sept. 22d*

At least, the appellee cannot be allowed to charge interest accruing on the note after the four years.

Wells, for the appellee, said the question was, whether the *St.* 1791, *c.* 28, applies to the case of a private claim of the administrator; for the appellee is unquestionably answerable to the estate of Jonathan Arms, if he neglected to collect this note. This question is settled by the case of *Richmond, Administrator, &c.* 2 Pick. 567. Though the date of the supposed payment is after the expiration of the four years, yet as there was no actual payment, the Court will allow the date to be altered. 396

J. H. Ashmun, in reply, denied that this was a debt due to the appellee personally; it was an independent claim of one

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Dickinson v. Arms.

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estate against another; the appellee is a mere trustee, and he cannot be personally affected, unless for some neglect.

PARKER C. J. delivered the opinion of the Court. The appellant supposes the decree wrong, in allowing to the administrator the amount of a promissory note, given by the intestate, David Dickinson, to Jonathan Arms in 1819, because it is charged as paid in October, 1828, more than four years after administration was granted on the estate of David Dickinson. And cases are cited to show that the administrator is not only not compellable, but that he ought not to pay any debts which are not demanded within that period.

We are inclined to think that the doctrine thus set up is correct, but not applicable to this case. Pliny Arms, the defendant, is administrator of both estates. As administrator of Jonathan Arms, he held the note given by Dickinson to Jonathan Arms's estate and was bound to collect it. The estate of David Dickinson being solvent, the defendant had a right to appropriate so much of the funds as would pay this note, the moment they came into his hands. And the law presumes that it was so appropriated; for he could not sue himself. He was chargeable, in his administration account of Jonathan Arms's estate, with the amount of this note; for he had funds in hand wherewith to pay it. The date of the payment, as stated in his account, is not conclusive against him as to the time of payment; and the relation in which he stood to both estates shows the payment was made before that time, and before the four years expired. He should not however have been allowed interest on the note after his liability to pay ceased.

The general objection to the whole allowance, because the account was not settled in the probate office until after four years from the time of taking out administration, is not sustained, neither the law, nor the practice in probate courts, having established such limitation against the accounts of administrators.

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CALVIN MERRILL *versus* LYMAN SAWYER AND NAHUM BRYANT.

The return of an officer that he has attached certain property, is not of itself sufficient evidence of an attachment in fact, in a suit against him by another officer claiming to have attached the same property. [See *p.* 398, note *].

Where a deputy sheriff returned on a writ, that on the day specified he had attached hay in the defendant's barn, his declaration on the same day, while he was at work on a fence near the barn, that he had attached the hay and was then watching it, was *held* inadmissible to prove the attachment, it not being a part of the *res gestæ*.

It is a sufficient attachment of hay in a barn, for the officer to go within view of it, declare that he attaches it and post on the barn-door a notification of the attachment.

TRESPASS for taking a quantity of hay, which the plaintiff attached as a deputy sheriff, on a writ against Norman Smith.

At the trial, before *Morton* J., the plaintiff produced the writ with his return on it, both dated December 17, 1825; also several witnesses, who testified that about 6 o'clock on the evening of that day, which was Saturday, the plaintiff went in view of the hay, which was in Smith's barn, and declared that he attached it; that the plaintiff placed on the barn-door a written notice that he had attached the hay; but that he did not remove any of it.

It was proved that Sawyer removed the hay from Smith's barn on the next Monday before sunrise, and that after the removal he was notified of the attachment by the plaintiff.

The defendants claimed the property by virtue of a previous attachment by Sawyer, who was also a deputy sheriff, and in proof of the attachment produced a writ against Smith with Sawyer's return on it, both dated December 16, 1825. They also proved, that at 7 o'clock on Saturday evening Sawyer informed the plaintiff that he, Sawyer, had previously attached the property, and forbade the plaintiff's removing it.

The defendants offered to prove by a witness, that on December 16th he saw Sawyer at work on a fence by the roadside, opposite to the barn and in view of it; and that Sawyer then told the witness, that he had attached the hay in the barn and was then watching it. But the evidence was rejected. 398

The judge charged the jury, that Sawyer's return was not, of itself, sufficient evidence of the attachment by him.

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Merrill v. Sawyer.

The jury found a verdict against Sawyer, but in favor of the other defendant; and Sawyer moved for a new trial on account of the misdirection of the judge.

Sept. 22d. *Bigelow*, for the defendants, contended that Sawyer's return was sufficient evidence of the attachment, at least *primâ facie*. *Bean* v. *Parker*, 17 Mass. R. 601. The evidence of the declaration of Sawyer which was rejected, should have been received as part of the *res gestæ*. 1 Stark. Ev. 49. The evidence of an attachment by the defendant, was as good as that of an attachment by the plaintiff.

J. H. Ashmun, for the plaintiff.

Sept. 25th. PARKER C. J. delivered the opinion of the Court.* By the report it appears, that the only ground taken for a new trial was the supposed misdirection of the judge to the jury, in stating that the return on the writ by Sawyer was not of itself sufficient evidence of an attachment. It certainly was not, against an officer claiming to have attached the same property.

But it is evident there were other points intended to be taken in relation to the validity of both attachments. The attachment made by the plaintiff on Saturday was valid, if there was no lawful lien upon the property at that time. He went within view of the hay with his writ, declared that he attached it, and posted a notification to that effect on the barn-door. There was then no person present claiming the possession of the hay.[1] The question then is, whether the defendant Sawyer had before made a lawful attachment, as the return of the writ imports. There is no evidence, apart from his return, of any act done by him. He was seen, on the evening of Saturday, working on a fence between the debtor's house and barn; and he told the person offered as a witness, that he had attached the hay and was watching it. This evidence was rejected; and we think, rightly, as it was only the declaration of the

* See this case explained in *Bruce* v. *Holden*, 21 Pick. 190; where it is said that both of the returns were *primâ facie* evidence of attachment, and that the first in point of time would have prevailed, but for other evidence showing that Sawyer had either failed originally to seize the property or to give publicity to his attachment, or had relinquished his possession.

[1] See *Sanderson* v. *Edwards*, 16 Pick. 146; *Duncklee* v *Fales*, 5 N Hamp R. 528.

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party, unaccompanied by any act tending to show an attachment, and therefore does not come within the exception to the rule which excludes the declaration of parties, as being part of the *res gestæ*. Merrill v. Sawyer.

Nor was his notice to the plaintiff, that he had attached the hay, of any avail, it being given after the plaintiff had made his attachment. 399

Motion for a new trial overruled.

Simeon Waters *et al.* Administrators, *versus* Abner Eddy.

Where a son made a bond to his father, reciting that the father had conveyed certain land to the son, and conditioned, among other things, to pay all the father's debts existing at the time of making the bond, and on the decease of the father his estate was declared, and eventually proved, to be insolvent; and the holder of a note of the father, dated prior to the bond, presented the same to the commissioners, by whom it was rejected as a debt which the son was bound to pay, and the holder of the note neglected to prosecute the same against the estate by a suit according to the provisions of the statute in such case; it was *held*, that the administrator might maintain a suit on the bond for the benefit of the holder of the note.

This was debt on a bond dated April 15, 1819, for 1500 dollars, by the defendant to his father, Abner Eddy, the intestate, on whose estate the plaintiffs were administrators. The condition was, among other things, that the bond should be void, provided the obligor should permit the obligee to take one half of the produce of a farm and occupy one half of a house, therein described, during his life, and "cause to be paid all the debts which the said Abner Eddy now owes, and save harmless and indemnify the said Abner from all costs which may arise from such debts." On the decease of Abner Eddy senior, his estate was represented insolvent, and proved in fact to be so. A note made by him during his lifetime, and dated January 1, 1818, for 19 dollars, payable to Nehemiah Hinds, and not paid during the intestate's life, was presented before the commissioners of insolvency, who refused to allow it, on the ground of its being dated prior to the bond, and being accordingly one of the debts which the obligor was bound to

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Waters v. Eddy.

pay. Hinds, the holder of the note did not prosecute the same at common law, pursuant to the statute of 1784, c. 2. Before the commencement of this suit, the plaintiffs presented the note and bond to the defendant and demanded payment of the note.

400 The case was submitted to the Court on an agreement that the plaintiffs should become nonsuit, or the defendant be defaulted, according to the opinion of the Court.

Sept. 23d. *Dewey* and *Clark*, for the defendant, contended that there was no liability on the part of Eddy, the father, to pay the debt, for which the note to Hinds was given; it had been discharged by operation of law and the proceedings which had been had. This note having been rejected by the commissioners on the intestate's estate, and no action at law having been commenced on the same, it could no longer be enforced against the estate.

This bond is substantially one of indemnity, and accordingly the obligor is not bound by it to pay any debt of the intestate which could not be enforced against him or his estate. The obligee must be damnified before he can call on the son upon the bond, or his representatives must first pay the debt. The bond was personal to Eddy the father, and not given for the benefit of his creditors. In case of his decease, Hinds's remedy was by suit at law, first giving notice of twenty days. The creditor could not enforce this bond. The claim is also void from the laches of the holder of the note.

Dickinson and *Marcy*, for the plaintiffs, said it was a condition of the bond that the defendant should pay the just debts of the intestate. He was bound to do this before any suit was commenced and within a reasonable time; and having neglected to do so, he is liable to a suit on the bond. The circumstance of the note not being allowed by the commissioners, is no defence to the defendant. In *Cooper* v. *Mowry*, 16 Mass. R. 5, it was held that a sheriff to whom a bond of indemnity was given, was not bound to wait until he was sued, before he could commence a suit upon the bond. The intestate was damnified; it was an injury to him to defraud his creditors, who became such previously to 1819, when he was solvent. The bond was intended for the benefit of the intestate's creditors. Money paid by A for the benefit of B, may be sued for by B

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in his own name; and so, when a contract is not under seal. *Arnold* v. *Lyman*, 17 Mass. R. 400; *Watson* v. *Cambridge*, 15 Mass. R. 286; *Felton* v. *Dickinson*, 10 Mass. R. 287. And when a contract under seal is made for the benefit of a third party, his interest will be protected After the decease of an assignor, the law allows his assignees to use the name of his executor. *Dawes* v. *Boylston*, 9 Mass. R. 337. This bond was for the benefit of Hinds, and he had his election to present his claim to the commissioners, or to resort to the bond.

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PARKER C. J. delivered the opinion of the Court. The condition of the bond is, that the obligor will pay all the debts which the obligee now owes. And this was an important part of the consideration for the conveyance of the estate to the son. The bond is payable to the obligee, his executors, &c.; which excludes the supposition suggested, that it was intended to be personal, so as not to be in force after his death. If the obligee had lived, he could have maintained an action on the bond for the non-payment of his debts, although he had not been called upon himself to pay them.

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The presentation of the note to the commissioners by the holder and their rejection of the claim, and the omission to prosecute at law, form no defence. The obligation was direct, to pay the debts. It may be presumed to have been a principal object with the obligee, to have justice done to his creditors. It was for this purpose that he conveyed his estate to his son. Indeed, without this purpose, the conveyance would have been fraudulent. How came his estate to be insolvent? Because he conveyed it to his son, in trust for himself, and for the payment of his debts. It would be a fraud upon the parent by the son, after having obtained title to his estate on the condition of paying his debts, to refuse payment of them because he died insolvent. The administrators have a right to exact of him money under this bond, to enable them to discharge debts, the payment of which their intestate had honestly provided for. We think it very clear that judgment should be for the plaintiffs.

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JOHN H. ASHMUN *et al. versus* ELIPHALET WILLIAMS *et al.*

Where a town-house was erected on land of the town under a contract with the builder that the town should occupy part of it at a certain rent, and should have the right to purchase the house at an appraised value, it was *held*, that the house was the personal property of the builder, but that an attachment of it in the manner in which real estate is attached, no actual possession being taken by the officer, was valid.

IN a case stated it was agreed, that in 1823, the town-house in Northampton having been destroyed by fire, Isaac Damons made different propositions in writing to a committee of the town, on the subject of rebuilding it. The town voted to accede to one of those propositions, namely, that he would erect a town-house partly on the ground on which the former one stood, of the dimensions and in the manner therein stated, the town to have the exclusive use of the hall and lobbies for the yearly sum of 170 dollars, and that whenever the town should choose to own the whole building, he would convey the same to the town at such price as the building should be appraised at by three disinterested men. But though in pursuance of the new contract the town-house was rebuilt, and the town have ever since occupied the second story under the proposition to which they had so acceded, and have regularly paid the stipulated rent therefor, such contract was never formally reduced to writing.

The fee of the land was to be considered, for the purposes of this action, as in the town.

In August, 1828, the town-house was attached, on divers writs, as the property of Damons, the officer taking no actual possession and putting no person into the actual custody of the property, but proceeding precisely as though the property had been the debtor's real estate. In October, Damons, being in failing circumstances, assigned the town-house as personal property to the plaintiffs, who took possession of it under the assignment, thenceforward leaving it in the situation in which they found it, and giving no notice of its conveyance to them by Damons. And in November he conveyed the same property
403 in mortgage, by a deed duly acknowledged and recorded, to

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the defendants and J. D. Whitney, one of the plaintiffs, neither of the defendants having any knowledge of its previous conveyance to the plaintiffs; and afterwards, in January, Damons released all his interest in the property to the defendants and Whitney for the benefit of Damons's creditors.

The town having purchased the town-house, the question arose, to whom the purchase money belongs; whether to the attaching creditors, the assignees of the personal property of Damons, or the assignees of his real estate.

If the Court should be of opinion, that the property was held by the attachments, or rightfully belonged to the defendants and Whitney under the conveyance to them, the plaintiffs were to become nonsuit; but if the property was not legally attached, and rightfully belonged to the plaintiffs under their assignment, the defendants were to be defaulted.

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J. H. Ashmun, for the plaintiffs, contended that the building could not be attached as real estate of Damons; the attachment should be made by taking possession in some way or other; perhaps putting a notice on the building would answer; but merely returning an attachment upon the writ, is not sufficient in the case of personal property.

L. Strong, *contrà*, said it was not important whether the property was technically real or personal estate; it was immovable estate and attachable without taking possession. It is however embraced by the terms *real estate*. 2 Bl. Com. 16; *Bates* v. *Sparrell*, 10 Mass. R. 323; *Spear* v. *Bicknell*, 5 Mass. R. 125; *Strout* v. *Berry*, 7 Mass. R. 385. The case of *Perrin* v. *Leverett*, 13 Mass. R. 128, is decisive of the one now under consideration.

Ashmun, in reply. The building is not real estate. It cannot be set off on execution. If it is real estate, it is the real estate of the town, and can be attached as such, only in a suit against the town. The interest of Damons was not a chattel real. The case of *Perrin* v. *Leverett*, respecting a pew, is inapplicable. A thing is not real or personal property, merely because it is heavy or light; but the distinction rests on the circumstance, whether the title depends upon possession or record. The title to pews being evidenced by record, brings

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Ashmun v. Williams.

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them within the rules respecting real estate, in regard to attaching and levying.

WILDE J. delivered the opinion of the Court. This case is submitted to our determination on facts agreed, for the purpose of ascertaining the parties' legal rights. Both parties claim under Isaac Damons, and we are first to inquire what was his right and property in the building in question, and what was the nature of his property. It was built and erected by him on land, the fee of which, it is agreed for the purposes of this action, was, and still is, in the town of Northampton.

It was so placed with the consent of the town and in pursuance of a contract with them, which, although not formally reduced to writing, they are willing to fulfil; so that no question is made whether the building belongs to the town as proprietors of the land. In fact the town have since purchased the building, with the consent, we presume, of all parties interested, and this action is prosecuted for the purpose of ascertaining to whom the purchase money must be paid.

Upon these facts the first question made is, whether Damons's property in the building was real or personal estate; as to which we think there can be no reasonable doubt. It was not real estate, for he had no title to the land. This was vested in the town, and but for their contract, they could undoubtedly hold the building as appertaining to the realty. But they disclaim that right, and admit Damons's right to the building, subject to the conditions and qualifications of his contract; and both parties stand on the ground of this admission. Damons's property, therefore, if any he had, was personal estate;[1] and there can be no doubt, we think, that one may own a building standing on the land of another with his consent, and may dispose of it, and it will be liable to attachment, the owner of the land interposing no claim.

The next question, and one of more difficulty, is, whether the attachments under which the defendants claim were valid, no actual and open possession of the property being taken by the attaching officer, but he having proceeded as though the property had been the debtor's real estate.

Generally, attachments of personal property are not valid

[1] See *Marcy* v. *Darling*, *ante*, 283; *Allen* v. *Scott*, 21 Pick. 28

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against subsequent purchasers, or attaching creditors, unless the officer takes possession of the property attached. But property of the nature of things immovable are not within the reason of the general rule, and are consequently to be excepted from its operation. The officer would have had no right to remove this erection, if the town had objected. Independent of the contract with Damons, it was a fixture and would pass with the land; and under the contract the town had a right of preëmption; so that the removal of the building was not authorized; and besides it could not be removed without material injury. Under these circumstances the officer took all the possession which could have been usefully taken of the property attached. It was similar to the possession afterwards taken by the plaintiffs under their assignment, which, although not accompanied with any act of notoriety, was nevertheless sufficient to pass the property but for the previous attachments. *Jewett* v. *Warren*, 12 Mass. R. 300. Such a possession, we think, is sufficient also to support the attachments.[1]

The plaintiffs therefore, according to the agreement of the parties, are to become nonsuit.

[1] See *Hemmenway* v. *Wheeler*, 14 Pick. 210; *Gordon* v. *Jenney*, 16 Mass. R. 465; *Fettyplace* v. *Dutch*, 13 Pick. 388. Provision is now made for the mode of attachment in such case, by Revised Stat. *c.* 90, § 33.

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CALVIN RICHARDS *versus* PEREZ ALLEN, Principal, and JUSTUS RUSSELL, Trustee.

A made an absolute deed of land to R, which was intended as a security for money to be advanced by R to and on account of A, and R, about a year after, gave A a bond to reconvey the land on payment of the money advanced in the mean time; R afterwards sold the land on a credit for an amount more than enough to pay all that was due to him from A; a part of the purchase money was secured by a mortgage of the land from the purchaser to R. R was afterwards summoned as trustee of A. At the time of the service, the amount secured by mortgage had not been paid, and the remainder of the price for which R sold, and which had been paid, did not amount to so much as was due from A to R. *Held*, that R was chargeable as trustee of A, for the difference between the price for which R sold the land, and the amount due to him from A.

In a trustee process, where the defendant is defaulted in the Common Pleas, and judgment is given charging the trustee upon his answers, the trustee may *appeal* from the judgment against him to this Court.

IT appeared from the answers of Russell, the trustee, that on February 7, 1820, Allen, the defendant, made a deed of his farm to Russell, and Russell gave Allen a note for 1500 dol-
406 lars on interest. The note was given to enable Allen to raise money on it, and the land was intended as security, though the deed was absolute. In the course of the next four months Russell advanced various sums and gave notes to Allen, which were indorsed on the note for 1500 dollars; and on June 5, 1820, paid the balance of the note and took it up. On January 7, 1821, Russell gave Allen a bond to reconvey, if Allen should pay 1600 dollars before March 17; this sum was said to be made up of the 1500 and interest. Allen occupied the farm for fourteen months after the deed was given, without paying rent, and afterwards for two years at a rent of 120 dollars a year, which was paid to Russell. Russell paid 40 dollars to obtain a release of dower in the farm from a Mrs. Prentiss; and in 1823 he sold the farm for 2000 dollars on a credit of four years, taking in payment notes of different persons, and the purchaser's notes for 800 dollars which were secured by mortgage of the farm to Russell. At the time this action was brought, in October, 1828, and at the time of the answer, the notes secured by mortgage, which became due in the spring of 1827, remained unpaid; and the purchaser had not personal property enough to pay them. Russell had taken no legal

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measures to compel payment. Russell considered himself as having obtained an absolute and unconditional title to the estate for an adequate consideration ; but if it was to be considered a trust estate, he claimed an allowance for various services and expenses in relation to the business specified in the answers, amounting in the whole to 207 dollars.

Russell also held two notes of Allen on interest, one dated October 9, 1820, for 22 dollars, the other, November 13, 1820, for 37 dollars ; and an execution for 122 dollars 59 cents.

In the Common Pleas the defendant was defaulted. After Russell had answered, he was adjudged trustee by the court, and by agreement of the parties an auditor was appointed to ascertain with what sum Russell should be charged, his report to be final between the parties. At a subsequent term of the Common Pleas, the auditor having made no report, Russell, by leave of the court, made an additional answer, the plaintiff objecting to its admission. The Common Pleas then adjudged Russell to be trustee ; from which judgment he appealed to this Court. 407

Wells, for the plaintiff, moved to dismiss the appeal, on the ground that after the principal was defaulted, an appeal from the judgment charging the trustee would not lie, as it is not given by any statute. He cited *Purple* v. *Clark*, 5 Pick. 206 ; *St.* 1820, *c.* 79, § 4, 5. The provisions of the statute do not apply to the case of a trustee. No issue was joined. This statute requires the party appealing to enter into a recognisance for costs ; but a trustee is not liable for costs. The other provisions in these sections are not at all applicable to the case of a trustee, and show that the legislature only considered the case of a common action between plaintiff and defendant. The statute only provides for an appeal on questions of fact, and gives a bill of exceptions on questions of law. A trustee's answer presents a mixed question of law and fact, for which the statute makes no provision. A *certiorari* would be the proper remedy for the trustee, as the proceedings are not at common law. *Gile* v. *Moore*, 2 Pick. 386. If the trustee had a right to appeal, it was lost by the proceedings in the Common Pleas after he was adjudged trustee. *Sept. 23d.*

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Richards v. Allen & Tr.

The Court of Common Pleas erred in receiving the answer which was made after the case was submitted to an auditor with an agreement that his report should be final; and that answer ought not to be considered here.

On the merits: the conveyance of the land in 1820, was fraudulent and void as to creditors, being on a secret trust. The whole proceeds of the land may be held by us in this process. *Burlingame* v. *Bell*, 16 Mass. R. 318. *Devoll* v. *Brown*, 5 Pick. 448. Even if the transaction was legalized by the bond, it is evident that there is a balance in the trustee's hands after paying all claims to himself. *Cleveland* v. *Clap*, 5 Mass. R. 201; *Sebor* v. *Armstrong*, 4 Mass. R. 206; *Ripley* v. *Severance*, 6 Pick. 474; *Hart* v. *Ten Eyck*, 2 Johns. Ch. R. 62. The trustee is properly chargeable on account of the unpaid notes taken for the land, since he has been guilty of negligence in not collecting them. Even if the trustee was not bound to disclose the trust, he is chargeable, having disclosed it. *Barrell* v. *Joy*, 16 Mass. R. 221.

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Grennell, for the trustee.

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Parker C. J. delivered the opinion of the Court. The answer of the trustee does not show any fraudulent intent between him and the principal, and if the original transaction could have been avoided by creditors, still upon the new arrangement, a bond being given by the respondent, the conveyance is good for the purposes intended. But the respondent held the land until the sale, and the proceeds afterward, as the trustee of the principal, for the payment of the debt to himself and such expenses as he had a right to charge, and for the use of the principal as to any surplus. He is therefore to account for the proceeds, and upon the account rendered it is clear that there is a balance in his hands belonging to the principal. He must therefore stand charged as trustee.[1]

It was moved to dismiss this appeal on the ground that no issue was joined at the Court of Common Pleas; but we are of opinion that the allegation of the plaintiff, that there were goods, effects, &c. deposited with the respondent, and his denial, constitute an issue, within the intent of the legislature.[2]

[1] See *Hazen* v. *Emerson*, 9 Pick. 144; *Bissell* v. *Strong*, 9 Pick. 562.

[2] See *Piper* v. *Willard*, 10 Pick. 34.

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The Inhabitants of CHARLEMONT *versus* The Inhabitants of CONWAY.

Whether a town can at any time set up their own illegal proceedings, or those of their officers, in the assessment of a tax, after the tax has been paid, to defeat a settlement gained thereby, *quære*. But where so long a time had elapsed since the payment of the tax, that no claim for reimbursement could be sustained, it was held that they could not.

Where the assessors assessed more than five per cent over and above the sum committed to them to assess, it was *held*, that the tax was not duly assessed within the meaning of *St.* 1793, *c.* 34, relative to gaining a settlement.

ASSUMPSIT to recover the amount of expenses incurred by the plaintiffs for the support of Dorothy Marsh, a pauper. The only question made at the trial, which was in the Common Pleas before *Williams* J., was whether the pauper had a legal settlement in the town of Conway.

The pauper was the daughter of Abner Marsh, and derived her settlement from him. Abner, with his family, removed to Conway in March, 1797, and continued to reside there until 409
August, 1823.

He was taxed in Conway, for State, county and town taxes, five years during that period, namely, in 1797, 1798, 1800, 1802, and 1803, and he duly paid all his taxes for those years, except his State and county taxes for 1798, which have never been paid, though the collector demanded and endeavoured to collect the same. In assessing the State and county taxes for 1798, which were assessed separately from the town taxes, the assessors added to the sum to be assessed, a sum exceeding five per cent upon the amount thereof, and assessed the whole accordingly. The plaintiffs contended that this tax was not duly assessed, but was illegally assessed, and was therefore void; and the judge being of this opinion, decided accordingly.

The defendants then offered to prove that Marsh assented to the assessment, and had refused to pay the taxes solely on account of his poverty; but the judge ruled that such supposed assent, if proved, would be immaterial, and refused to submit that question to the jury.

The defendants then offered to show that all the State, county and town taxes above mentioned were also illegal, and

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Charlemont v. Conway.

therefore void; but the judge ruled, that the defendants, after having assessed and collected the taxes and received the benefit of them, and after an acquiescence in them by all parties for so long a time, could not be permitted to prove their illegality for the purpose of relieving themselves from their liability in this suit, and the evidence was accordingly rejected.

The jury found a verdict for the plaintiffs, and the defendants filed exceptions to the opinions and directions of the judge.

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Billings and *J. W. Clark*, for the defendants. Though the taxes of 1798 were illegal, they were duly assessed so far as regards the settlement of Abner Marsh. A tax may be illegal in many respects, and yet not be void. *Dillingham* v. *Snow*, 5 Mass. R. 558; *Colman* v. *Anderson*, 10 Mass. R. 105. The assessment in question was only a voidable act; of which the defendants and Marsh might have taken advantage, but the plaintiffs cannot, they being strangers. Bac. Abr. *Void &c. F*; *Green* v. *Kemp*, 13 Mass. R. 515; *St. Nicholas* v. *St.* 410 *Peter's*, 2 Str. 1066. Any tax which is not so void as that an officer collecting it would not be protected, and which is assessed in due form, is "duly assessed" within the meaning of *St.* 1793, *c.* 34, respecting paupers. Here the collector might have enforced payment of the State and county taxes, without being liable to an action.

If the plaintiffs can take advantage of illegal proceedings in regard to the State and county taxes, the defendants likewise may avail themselves of any illegality as to the taxes which were paid. It is a mistake to suppose that the town assess the taxes; it is the assessors. Their being elected by the town does not make them the agents of the town, any more than the appointment of a judicial officer by the governor makes him the agent of the governor.

Bates and *Maxwell*, *contrà*, insisted that the State and county taxes of 1798, were illegally assessed; *Libby* v. *Burnham*, 15 Mass. R. 144; and therefore were not duly assessed, within the meaning of the statute of 1793. Marsh was under no obligation to pay them, and the non-payment of an illegal tax is not to prevent him from gaining a settlement. It is said that the plaintiffs are strangers and therefore cannot make the ob

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ection; but their rights are derived through Abner Marsh, who was a party. These two towns are by operation of law made parties. Charlemont v. Conway.

The defendants then say that the taxes paid were illegal. There are two answers to this; *first*, if they could show that fact, it would not avail them, because it appears that Marsh was taxable and able to pay the taxes; so that whether he were or were not taxed, would be immaterial; *Wrentham* v. *Attleborough*, 5 Mass. R. 433; *Reading* v. *Tewksbury*, 2 Pick. 535. But, *secondly*, the defendants shall not be allowed to take advantage of their own wrong. They made the assessment, and have received the benefit of the taxes.

Billings, in reply, said that an omission to tax a person liable to be taxed, if not done fraudulently with a view to prevent his acquiring a settlement, would not operate against the town

PARKER C. J. drew up the opinion of the Court. A majority of the Court are of opinion, that the judgment of the Court of Common Pleas ought to be affirmed. *April term 1830, in Hampshire*

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The case is brought within the provision of *St.* 1793, *c.* 34, which constitutes a residence of ten years, with a payment of all taxes which shall be duly assessed any five years within that time, a habitancy or settlement. The town tax for the year 1798 was paid by the pauper's father. The State and county taxes of that year were not; but they were not *duly assessed*, the assessors having exceeded their authority in adding to the sum required by the legislature more than five per cent. All the taxes which were duly assessed for the five years had been paid.

But the defendants proposed to prove that there was some illegality in all the taxes which had been paid, so as to avoid the effect of such payment in fixing the settlement. This was rejected by the Court of Common Pleas and we think rightly. It is near thirty years since the last of these taxes was assessed and paid. There has been no call for reimbursement, and none could be sustained at this period. It would be altogether unjust to allow the defendants, after having enjoyed the benefit of those taxes, which must have been intended to be properly granted and *duly assessed*, to set up the fault of the town or its

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Charlemon v. Conway.

officers, in avoidance of the legal settlement established thereby.

The situation of the plaintiff and defendant towns is different in this respect. The plaintiffs call for reimbursement of expenses incurred in the support of a pauper, whose father had lived in the defendant town twenty-five years, and who had paid taxes therein five years within that period. They are met by the objection, that a portion of the tax for one of those years had not been paid. This is answered by showing, that this portion the father of the pauper was never obliged to pay, it not being duly assessed. It is replied that the other taxes were either illegal or not duly assessed. To this it is a sufficient answer, that they were paid and had gone into the several treasuries, and could not be reclaimed ; which is quite equivalent to their having been duly paid, in regard to the object and purpose of the legislature in making this a ground of settlement.

It may be doubted, whether a town can, at any time, set up its own illegal proceedings in regard to taxes, or the misconduct
412 of its officers, after the taxes have been paid, to defeat the settlement gained thereby.[1] But after such a lapse of time as shuts out all claim for reimbursement, we think it clear they cannot.

Judgment of Court of Common Pleas affirmed.

JOEL MILLER *versus* JOEL CLARK *et al.*

It seems, that an amendment by filing a new count for the same cause of action contained in the original writ, will not discharge bail from their responsibility *Per Wilde J.*

Where a sheriff attaches goods upon an original writ and delivers them to a bailee upon his engaging to redeliver them on demand, such an amendment does *not* discharge the bailee from his responsibility to the sheriff.

ASSUMPSIT. The plaintiff, as a deputy sheriff, attached certain property of Noah Clark on a writ in favor of one Lamb as executor against N. Clark, and delivered it to the defendants, taking from them a receipt in which they promised to re-

[1] See *Southampton* v. *Easthampton*, *ante*. 383

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deliver it to the plaintiff upon demand. The present action was founded upon this receipt.

Miller v. Clark.

The defence was, that after the entry of the action of Lamb against Clark, Lamb, by leave of court, amended his writ, which contained only one count, by adding three new counts. The original count was for money had and received by N. Clark to the use of Lamb as executor. The *first* additional count was for money had and received to the use of the testator, and a promise in consideration thereof to pay the executor; the *second*, on an *insimul computassent* between Lamb, as executor, and Clark, of money due to Lamb as executor, and a promise to pay him as executor; and the *third*, for money had and received to the use of the testator, and a promise to pay the testator.

The defendants offered evidence to prove that the property attached was not removed from the farm where N. Clark lived with one of his sons, who is one of the defendants, and that it remained on the farm until after the amendment of the writ, when N. Clark sold a part or the whole of it to two of his sons.

Wilde J. was inclined to the opinion, that the attachment was not dissolved by the amendment, there being no proof that any new demand was proved under the new counts. The defendants thereupon agreed to be defaulted, with liberty to move to take off the default; which motion was to be granted, if the Court should be of opinion that the attachment was dissolved.

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G. Bliss and *J. H. Ashmun*, relied on the cases cited in *Clark* v. *Lamb*, 6 Pick. 512, (argued on the preceding day,) as showing that the new counts were for a different cause of action; and to show that the attachment was dissolved by the amendment, they cited *Bean* v. *Parker*, 17 Mass. R. 591; *Danielson* v. *Andrews*, 1 Pick. 156; *Hill* v. *Hunnewell*, ibid. 192; *Willis* v. *Crooker*, ibid. 204; *Spalding* v. *Mure*, 6 T. R. 363; *Putnam* v. *Hall*, 3 Pick. 445; *Denny* v. *Ward*, ibid. 199. Bail are discharged by a reference of all demands; and the *insimul computassent* embraced all the demands which would have come within such a reference. In *Willis* v. *Crooker*, where the original count was for money had and re-

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Miller v. Clark.

ceived, filing a new count upon an account annexed was held to discharge the attachment. In regard to the question before the Court an *insimul computassent* stands on the same ground as an account annexed. The defendants are to be viewed in the light of bail; they are responsible for the property attached, as bail are for the body. *Brigham* v. *Este*, 2 Pick. 425, and *Cooper* v. *Mowry*, 16 Mass. R. 5, were also cited.

Dewey and *Bowdoin*, *contrà*, as to the distinction between bail and a receipter for property attached, cited *Phillips* v. *Bridge*, 11 Mass. R. 247; *Whittier* v. *Smith*, ibid. 211; *Perley* v. *Foster*, 9 Mass. R. 112.

April term 1830, in Hampden.

WILDE J. delivered the opinion of the Court. Upon the facts stated in the report of this case, we are of opinion that the attachment made by the plaintiff was not dissolved by the amendment of the writ, and consequently that he is entitled to judgment.[1]

Whether such an amendment would discharge bail, is a question not now to be decided; but I apprehend it would be

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difficult to assign any good reason why it should have such an operation. This is not like the case of *Bean* v. *Parker & al.* 17 Mass. R. 591, for here was no new demand substituted or proved under the new counts. If there had been, undoubtedly it might have been proved in the defence. Bail is responsible for the demand contained in the suit; and he is not discharged from his responsibility, as it seems to me, by the plaintiff's declaring against the principal in a different form, provided it is for the same demand.[1]

This, however, is not a case against bail. The defendants were the mere servants of the plaintiff, or keepers of the property attached, and thus were bound by their contract to deliver it up on demand. If they had performed their contract, they could by no possibility have been exposed to any loss.

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[1] See *Fairfield* v. *Baldwin*, 12 Pick. 388.

[1] See *Seely* v. *Brown*, 14 Pick. 177; *Wright* v. *Brownell*, 3 Vermont R. 435; *Robeson* v. *Thompson*, 4 Halsted, 97; *Matthews* v. *Armstrong*, 4 Yerger, 181; *Pell* v. *Griggs*, 4 Cowen, 426; *Blue* v *Stout*, 3 Cowen, 354; *Bryan* v. *Bradley*, 1 Taylor, 77; *Waples* v. *Derrickson*, 1 Harring. 134; *Murrel* v. *Halbert*, 1 Bailey, 238; *West* v. *Rutledge*, 4 Devereux, 40; *Woodfolk* v. *Leslie*. 2 Nott & M'Cord, 585.

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Nor have they any defence under the subsequent sale by the debtor, for the purchasers took the property subject to the plaintiff's lien, which was then subsisting in full force against the debtor. The previous amendment could not dissolve it in respect to him; and the purchasers can stand in no better situation than the debtor did at the time of the purchase. The plaintiff's attachment was as valid as it would have been if it had been made on a new writ at the time when the amendment was made. This case therefore is clearly distinguishable from all the cases where questions have arisen between attaching creditors, and nothing appears to justify the non-performance of the defendant's contract.

Motion to take off the default overruled.

NOAH CLARK, in Error, *versus* EZEKIEL LAMB, Executor, &c. 415

A verdict in this Court may be amended by the judge's notes, after error brought and joinder in error.

Where three counts alleged a promise to the plaintiff as executor and a fourth a promise to the testator, all being for the same cause of action, and the defendant pleaded to the three first, that the action did not accrue to the plaintiff within six years, and to the fourth, that the action did not accrue to the testator within six years, and the jury found for the plaintiff upon the first issue, saying nothing about the other, the plaintiff was allowed, after error brought, to amend the verdict by the judge's notes, upon payment of costs.

THIS was a writ of error to reverse a judgment of this Court* rendered at September term 1827, in Hampshire. The original writ contained only one count, which was for money had and received by Clark to the use of Ezekiel Lamb as executor of Daniel Lamb. At the return term three new counts were filed; one for money had and received to the use of the testator, and a promise in consideration thereof to pay the executor; another, on an *insimul computassent* between Ezekiel as executor and Clark, of money due to Eze-

* In the report of this case in 6 Pick. 512, in the first edition and in some copies of the second, it is erroneously stated that the judgment was rendered in the Court of Common Pleas in 1826, and that the motion for a new trial was made in that court

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Clark v. Lamb.

kiel as executor, and a promise to pay him as executor; and a third, for money had and received to the use of the testator, and a promise to pay the testator. Clark pleaded, 1. *non assumpsit* to the whole declaration; on which issue was joined to the country. 2. To the first, second and third counts, that the causes of action did not accrue to Ezekiel in his capacity of executor, within six years; and issue was joined on that fact. 3. To the fourth count, that the action did not accrue to the testator within six years; and issue was joined on that fact. 4. *Non assumpsit infra sex annos*, to the whole declaration.

At the trial, before *Wilde* J., the jury returned a verdict that "the defendant (Clark) did promise the plaintiff (E. Lamb) in manner and form as he has alleged in his declaration, within six years next before the commencement of said action," and assessed the damages. Judgment was entered on the verdict.

416 It was assigned for error, that the verdict does not find the whole of the issue joined.

After error brought, *Wilde* J. certified from recollection, that the principal part of the evidence offered by the plaintiff was applicable to the second and third issues, and that it tended to show that Clark had fraudulently obtained from the testator divers notes of hand due to him, and had collected some of the notes within six years before the commencement of the action; that the counsel of Clark contended that the statute of limitations began to run from the time when the notes were obtained, which was more than six years before the action was brought, but that the jury were instructed to find for the plaintiff for all the sums of money which Clark had received on the notes within six years before the commencement of the action; that the greater part of the plaintiff's evidence, as to the damages, applied to this subject of inquiry; and that there was no sufficient evidence to support the verdict as to the amount of damages, unless the jury had found for the plaintiff as to the notes of hand so collected as above mentioned.

Sept. 23d. *G. Bliss* and *J. H. Ashmun* contended that the verdict could not be amended after judgment. *Grant* v. *Astle*, 2

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Doug. 722; *Brown* v. *Chase*, 4 Mass. R. 436; *Hutchinson* v. *Crossen*, 10 Mass. R. 251; *Atkins* v. *Sawyer*, 1 Pick. 351. The certificate is not within the rule of the Court of King's Bench; it is not made from the minutes, but from the recollection of the judge. If such a certificate is admissible, any verdict may be set aside upon parol evidence. [*Wilde* J. My minutes I suppose may be obtained, but my recollection was distinct, and I had the minutes of the defendant's counsel before me when the certificate was made.] In England the verdict is drawn by the clerk; here it is by the foreman of the jury, under the direction of his fellows; so that if in England the court may alter the writing of the clerk, this Court will not therefore be authorized to alter a verdict taken according to our practice.

Bates and *Dewey* relied on *Petrie* v. *Hannay*, 3 T. R. 659. They cited likewise, *St.* 1784, *c.* 29, § 14; *Williams* v. *Hingham &c. Turnpike*, 4 Pick. 349; 2 Dunlap's Pr. 702.

The opinion of the Court was afterwards drawn up by

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April term 1830, in Hampshire

Wilde J. The question now to be decided on this writ of error is, whether the verdict in the original action may be amended conformably to the facts as certified by the judge; and we are clearly of opinion, that according to all the authorities it may be so amended.

In the case of *Chapman* v. *Gale*, 2 Lev. 22, which was debt against an executor, judgment was entered up against him *de bonis propriis*, and thereupon error was brought, and it was assigned, that the judgment should have been *de bonis testatoris*, *si &c.* Upon the affidavit of the attorney, that he gave his clerk instructions to enter it up according to the plea, and that it was a mere mistake of the clerk, the judgment was amended.

In the report of this case by Keble, (2 Keb. 810,) it is said, that the amendment was allowed by consent of parties; but Levinz is rather to be relied on; and of this opinion was Lord *Mansfield*, in the case of *Short* v. *Coffin*, 5 Burr. 2730, in which a similar amendment was allowed after writ of error brought and *in nullo est erratum* pleaded. In the case of *Doe* v. *Perkins*, 3 T. R. 749, it was decided that the *postea* may be amended by the judge's notes at any time, even after final

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Clark v. Lamb

judgment and writ of error brought, and it was said this practice was as ancient as the time of Charles the First. So in the case of *Rees* v. *Morgan*, 3 T. R. 349, a judgment was amended after writ of error brought, and also in the cases of *Usher* v. *Dansey*, 4 Maule & Selw. 94; *King* v. *Keat*, 1 Salk. 47; *Elliot* v. *Skypp*, Cro. Car. 338; *Eddowes* v. *Hopkins*, 1 Doug. 376; and *Williams* v. *Breedon*, 1 Bos. & Pul. 329.

But the case of *Petrie* v. *Hannay*, 3 T. R. 659, is directly in point and cannot be distinguished from the case under consideration. There the defendant pleaded the general issue and the statute of limitations. A verdict was found for the plaintiff on the first issue, and no notice taken of the last. After error brought and joinder in error, (which was assigned on this point,) the court allowed the verdict to be amended by the judge's notes, on payment of costs. In the case of *Harrison* v. *King*, 1 Barn. & Ald. 161, an amendment was refused; but this was after a lapse of eight years from the ren-

418 dition of judgment, and seven years after the writ of error had been brought and after the reversal of the judgment; so that the defendant in error had, as Lord *Ellenborough* thought, slept the sleep of death over his rights. *Abbott* J. says, "the application should be made recently after the trial, for the judge bears then in memory much of what has passed at the trial; whereas it is impossible to suppose, that at a great distance of time, any human memory can recollect the circumstances." This case, therefore, is not opposed to the general rule; but rather confirms it, with a reasonable qualification; so that the course of practice in England has been long well established, and it has been adopted here so far as cases have occurred requiring its salutary aid. *Barnard* v. *Whiting*, 7 Mass. R. 358; *Barnes* v. *Hurd*, 11 Mass. R. 57; *Sullivan* v. *Holker*, 15 Mass. R. 374; *Patten* v. *Gurney*, 17 Mass. R. 182.[1] And I cannot imagine any reasonable objection that can be made to this course of practice; on the contrary, a different course, as contended for by the plaintiff's counsel, would

[1] See Revised Stat. *c.* 100, § 22; *Jones* v *Kennedy*, 11 Pick. 125; *Hanley* v. *Levin*, 5 Hammond, 227; *Roulain* v. *M'Dowell*, 1 Bay, 490; *Sagre* v. *Jewett*, 12 Wendell, 135; *Payson* v. *Whitcomb*, 15 Pick. 212; *Rowell* v. *Brace*, 5 N. Hamp. R. 383.

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greatly obstruct the administration of justice. In all proceedings mistakes will occur, notwithstanding all ordinary care, and when they do thus happen, they ought, if possible, to be corrected without injury to either party. The course of practice adopted by the courts was founded on this principle, and it applies with perfect justice to the present case. If there were any doubt as to the facts which occurred at the trial, or any question made, whether there had been a full trial on the merits, the proper course would be to grant a *venire de novo*. But the case has been fully heard and considered, both as to the facts and the law; and upon the merits of the case there can be no question which has not been already disposed of. The effect of the statute of limitations was fully considered, and a large portion of the original plaintiff's demand was thereby barred. The only error or mistake arose from a mere slip in drawing up the verdict, and clearly this ought not to be allowed to vacate the judgment. The verdict is, therefore, to be amended, and on payment of costs the plaintiff in error is to become nonsuit.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF WORCESTER, SEPTEMBER TERM 1829 AT WORCESTER.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE,
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, } JUSTICES.
HON. MARCUS MORTON, }

EDWARD CARRINGTON *et al. versus* SAMUEL SMITH.

Where the person appointed by a sheriff to take custody of personal property attached, abandons it, and it comes into the possession of an adverse claimant, the lien created by the attachment is lost.

A mortgage was made of a factory and certain machinery "in preparation soon to be placed there," but no possession of the property was taken at the time, and the mortgager still continued to occupy the factory. The machinery was afterwards attached in the factory, in a suit against the mortgager, and a person at the factory was appointed by the attaching officer to take charge of the machinery attached. This person subsequently absconded, and the mortgagee took possession of the mortgaged property, real and personal, including what had been attached. An execution having issued in the suit in which the attachment was made, the attaching officer took the machinery out of the possession of the mortgagee, and sold it on the execution. *Held*, that the possession of the machinery taken by the mortgagee perfected his title under the mortgage; that at the time the officer took the machinery on execution, he had lost the lien created by his attachment; and that the mortgagee might maintain trespass against the officer.

THIS was an action of trespass for breaking and entering the plaintiffs' close in Southbridge, and carrying away a spinning mule.

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The defendant pleaded, 1. The general issue, *not guilty:* 2. As to whatever is against the peace, except the breaking and entering, not guilty, tendering an issue to the country; and for a justification as to the residue of the supposed trespass, that he, as a deputy-sheriff, on October 10, 1826, attached the mule, which was then the property of Francis Harding, at the suit of Asa Pierce and Caleb Pratt against Harding, on the close, which was a factory then in the lawful possession of Harding, and, with Harding's consent, left the mule in the factory in the custody of Leonard Harding; that judgment having been recovered and execution issued in that action, the present defendant attached and levied the execution on the mule, January 16, 1827, and advertised it to be sold, January 20, 1827; that on the 20th of January he went to the factory to sell the mule on execution, but found it shut and locked, Leonard Harding having absconded; that he then requested Elbridge Harding, who had the keys of the factory, to open the door and let him remove the mule, or to deliver it to him; that Elbridge refused to do either, whereupon the defendant broke into the factory through the window, doing as little damage as possible, and removed the mule and sold it on execution. 420

The plaintiffs replied, that Francis Harding, on March 4, 1825, by a deed of that date, mortgaged the close and the mule to them, to secure the payment of 1000 dollars in four years by annual instalments, and that on January 4, 1827, the plaintiffs entered into the close for a breach of the condition of the mortgage, and took possession of the same and of the mule, and continued in possession of the same until the time of the trespass committed by the defendant.

The defendants then craved oyer of the mortgage deed, which was a mortgage of the factory and personal property in it, and of a mule and other articles mentioned, "in preparation soon to be placed there."

After oyer of the deed, the defendant demurred specially to the replication for the following causes: 1. Because the replication did not aver an actual or legal delivery to, or possession had by, the plaintiffs, of the mule or close, at the time of the execution of the mortgage deed, or before the attachment, or that the defendant or the attaching creditors knew of

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Carrington v. Smith.

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the mortgage at the time of making the attachment: 2. Because the replication did not traverse or deny that the mule was the property of Francis Harding at the time of the attachment, or that he was then possessed of the close: 3. Because the replication did not aver that the plaintiffs, at the time of the attachment, held or claimed to hold, possessed or claimed to possess, the close by virtue of the mortgage.

Sept. term 1828.

The case was argued on the demurrer by *Tufts*, for the defendant, and *Merrick* and *Bottom*, for the plaintiffs.

Oct. 5th, 1829.

PARKER C. J. delivered the opinion of the Court. The question arising out of the pleadings in this case is, whether the property in the mule taken and sold on the execution against Francis Harding, was in the plaintiffs, at that time, or in Harding. The attachment was made on the 10th of October, 1826, the factory in which the mule was placed being then in the actual possession of Harding, and the mule having been put by the defendant, after his attachment, in the keeping of Leonard Harding. But before this, in March, 1825, Francis Harding had by deed of mortgage conveyed the factory, and the mule, not then therein, but in preparation and soon to be placed there, to secure a debt of 1000 dollars, which was to be paid by instalments in four years. There having been no delivery of the mule at the time of the conveyance, though between the parties to it the mule passed, yet it was liable to the attachment of the creditors of F. Harding.[1] The attachment however holds no longer than the custody remains in the sheriff, and when that custody is lost, if the mortgagees come into possession by virtue of their conveyance, their title is complete. It appears that the plaintiffs entered into the mortgaged premises for condition broken, on the 4th of January, 1827, the mule then being in the factory; so that it came into their possession under their contract, unless the attachment then continued in force. Whether it did or did not, doe not distinctly appear, for the defendant, in his plea, has alleged that Leonard Harding had the keeping of the mule for the sheriff, but without stating the time when he absconded. But on the supposition that the attachment then continued in force,

[1] See *Bonsey* v. *Amee*, *ante*, 237, and note 1.

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it ceased upon the taking on execution, which is averred to be on the 16th of January, 1827. Now it does not appear by the plea, that the mule was taken into the custody of the sheriff, or left in the care of any one after the alleged taking on execution; so, for aught appearing, this was a mere formal act preparatory to a sale on execution. It does appear by the defendant's showing, that the mule was left in the factory, 422 without being committed to the care of any one. The factory was the plaintiffs' property and then in their sole possession, and that gave them possession of the mule, which had been conveyed with the factory. This was not, then, a levy which could deprive them of their right, by virtue of the previous attachment, there being no possession taken by the sheriff and no removal by him; so that when he came to demand possession on the day of the intended sale, he had lost his lien, and the plaintiffs' title became perfect under the mortgage. There cannot be a seizure of goods on execution, unless the officer has the actual custody and possession of them. *Lane* v. *Jackson*, 5 Mass. R. 157.[1] We think there can be no doubt, that another attachment made on the mule between the 16th and 20th of January would have held, for there was not even constructive possession in the defendant during that time. A conveyance also to a *bonâ fide* purchaser would have been good, if the property had not been mortgaged. We see no sufficient reason then why the mortgage made long before, for a valuable consideration, should not draw to it the mule, when in the actual possession of the mortgagees.

The replication however is liable to some of the objections taken to it in the special demurrer, especially in that it is argumentative and does not contain a direct allegation that the property of the mule, or the possession, was in the plaintiffs, but leaves this to be inferred. The replication may be amended on payment of costs since the demurrer was filed.

[1] See *Merrill* v. *Sawyer*, *ante*, 397; *Sanderson* v. *Edwards*, 16 Pick. 146; *Dunckles* v. *Fales*, 5 N. Hamp. R. 528.

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Carrington v. Smith.

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the mortgage at the time of making the attachment: 2. Because the replication did not traverse or deny that the mule was the property of Francis Harding at the time of the attachment, or that he was then possessed of the close: 3. Because the replication did not aver that the plaintiffs, at the time of the attachment, held or claimed to hold, possessed or claimed to possess, the close by virtue of the mortgage.

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[1] *ante*, 237, and notes.

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The President &c. of the Oxford Bank *versus* Daniel P. Haynes.

Where upon the back of a promissory note made by S and A to the plaintiffs, were written the words, "I guaranty the payment of the within note," which were signed by the defendant, it was *held*, that he was a guarantee and not a surety.

The guarantee of a promissory note will be discharged by a neglect of the holder to demand payment of the maker and to give the guarantee notice of non-payment, provided the maker was solvent when the note fell due but has since become insolvent.

Assumpsit upon a promissory note, dated on October 9, 1823, for 1000 dollars, payable to the Oxford bank in sixty days and grace.

On a case stated it appeared, that the note was made by Alpheus Smith and James Anderton as principal and surety, jointly and severally, and was offered at the bank for discount; but the bank refused to discount it, and the cashier wrote on the back of it the words, "I guaranty the payment of the within note," to which Smith procured the signature of the defendant. The note was then discounted at the bank, and the amount thereof was paid to Smith. A payment of 250 dollars was made by Smith at the maturity of the note, about the 1st of December, 1823, and no notice of the non-payment of the residue was given to the defendant. The note so remained until October 7, 1824, when an action was commenced upon it against Smith, and one Southgate was summoned as his trustee. Judgment was rendered in that action, in March, 1825, and Southgate paid on the judgment the amount in his hands, being 535 dollars; and nothing has been paid upon the note or judgment since. Smith and Anderton were reputed to be men of property at the time of making the note and so continued until the time of their failures. Smith failed about the 23d of January, 1824, and Anderton in February following, each being possessed of visible and attachable property much exceeding the amount of this note, and which was attached and levied on by their other creditors. Since their failures they have continued insolvent.

Smith lived about ten miles from the Oxford bank and in the same village with Haynes, at the date and maturity of the

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note. Anderton lived between this village and the bank, and about six miles from the bank.

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On the 7th of October, 1824, the directors of the bank chose a committee to go to Leicester to effect an adjustment of the affair, and notice was then given to Haynes that the note had not been paid. Haynes had never given the plaintiffs notice of the failure of Smith and Anderton, nor requested the plaintiffs to collect the note. Both Smith and Anderton, previous to their failures, were in the habit of doing business at the Oxford bank.

The plaintiffs were to become nonsuit or the defendant to be defaulted, according as the Court should order.

The declaration contained two counts; one charging the defendant as an original promisor, the other as a guarantee.

Barton, for the plaintiffs. No demand on the promisor, nor notice to the defendant, was necessary. Sept. term 1828

A guarantee is one who undertakes to see the stipulation made by another performed, or to perform it himself. It is not a conditional undertaking, like that of an indorser, but an absolute one. The guarantee puts his name on the note to increase the security; the indorser, to show that he relinquishes and assigns his interest in the note. The indorser's undertaking is a mere implication of law; it is implied that there shall be a demand and notice, and that then he will pay; the contract of the guarantee is express. The analogy between a guarantee and a surety is most strict. A surety undertakes in the first instance to pay the debt of another; a guarantee, that he will see it paid or pay it himself. This is the only difference. Now the law as to sureties is well settled. *Hunt* v. *Bridgham*, 2 Pick. 583; *Crane* v. *Newell*, ibid. 612. A guarantee by a blank indorsement has been regarded precisely as a surety. *Josselyn* v. *Ames*, 3 Mass. R. 274; *Moies* v. *Bird*, 11 Mass. R. 436; *Sumner* v. *Gay*, 4 Pick. 311. In *Upham* v. *Prince*, 12 Mass. R. 14, which was an action against the guarantee of a negotiable note, the undertaking was considered to be unconditional. *Allen* v. *Rightmere*, 20 Johns. R. 365, is to the same effect.

But admitting that the defendant was only conditionally liable, he had sufficient notice. He was not entitled to the

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same notice as an indorser, who is aided by the law merchant, but only to reasonable notice. It would have been futile to give a formal notice in this case. Smith lived in the same village with the defendant and his failure was notorious; and the conduct of the defendant amounts to a waiver of notice. *Boyd* v. *Cleveland*, 4 Pick. 525.

Merrick, on the same side, contended that this was not a contract of guaranty, but that it was an original engagement by the defendant as a surety. He cited *Hunt* v. *Adams*, 5 Mass. R. 358, and 6 Mass. R. 519; *Cobb* v. *Little*, 2 Greenl. 261; 3 Wheat. 148, note; *Carver* v. *Warren*, 5 Mass. R. 545; *Phillips* v. *Astling*, 2 Taunt. 206; *Warrington* v. *Furbor*, 8 East, 242.

Washburn, for the defendant. A contract of guaranty differs from that of principal and surety. An action cannot be brought upon it in the same way. The undertaking is collateral, and the remedy is by an action of special assumpsit. Fell on Guar. 188; 1 Wms's Saund. 211, note 2; *Mines* v. *Sculthorpe*, 2 Campb. 215. This Court have recognised the principle, that a guaranty is a collateral undertaking. *Carver* v. *Warren*, 5 Mass. R. 546. Where the name has been indorsed in blank, the holder has been allowed to consider the indorsement either a guaranty or an absolute promise; as in *Josselyn* v. *Ames* and *Moies* v. *Bird* before cited, and *Tenney* v. *Prince*, 4 Pick. 385. But here the defendant elected to be a guarantee, and the plaintiffs are estopped to treat him as a surety. A guaranty is a conditional promise. Fell on Guar. 1; *Phillips* v. *Astling*, 2 Taunt. 206. A guaranty was not allowed to be proved under a commission of bankruptcy, because it was contingent. *Ex parte Adney*, Cowp. 460. It is an insurance of the solvency of the principal. *Warrington* v. *Furbor*, 8 East, 245. Here the principals were solvent at the time when the note fell due; and payment ought to have been demanded of them, and in a reasonable time. Com. Dig. *Principal and Surety*, K 2; *Morris* v. *Cleasby*, 4 Maule & Selw. 574; 8 East, 245; *Moakley* v. *Riggs*, 19 Johns. R 69. And notice of the demand and non-payment should have been given to the defendant. *Bank of New York* v. *Livingston*, 2 Johns. Cas. 409; *Sturgis* v. *Robbins*, 7 Mass. R

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301 ; 2 Taunt. 206 ; *Holbrow* v. *Wilkins*, 1 Barn. & Cressw. 10. The notice must be reasonable ; not always so immediate as in the case of an indorser, but the holder shall not delay so long as to cause an injury to the guarantee. Chitty on Bills (Amer. ed. 1821), 264 ; *Nicholson* v. *Gouthit*, 2 H. Bl. 612 ; 3 Stark. Ev. 258, 650 ; [1 Dane's Abr. 416.] Here a new credit of ten months has been given to the principals, without notice to the guarantee ; and the delay discharges the guarantee, though it would be otherwise in the case of a surety. And if the delay alone is not sufficient, here was gross laches. *Cremer* v. *Higginson*, 1 Mason, 339 ; *Russell* v. *Perkins*, ibid. 368 ; *Duval* v. *Trask*, 12 Mass. R. 154 ; 3 Wheat. 154 ; *Peel* v. *Tatlock*, 1 Bos. & Pul. 419 ; *Gibbs* v. *Cannon*, 9 Serg. & Rawle, 202.

Oct. 5th, 1829

PARKER C. J. delivered the opinion of the Court. It is very clear from the facts stated, that the bank might easily have secured the amount of the note, had they attempted to do it when it became payable, or within a month afterwards ; and that Haynes, the defendant, had he been seasonably called upon and been notified of the non-payment of the note, might without difficulty have obtained security from the property of either or both of the promisors. Had he been an indorser of the note, most clearly by the above facts he would have been discharged, not only because the condition of giving notice was not strictly complied with, but because there was gross negligence on the part of the bank, and a new credit given to the promisors without the consent of the indorser.

Haynes therefore cannot be liable, unless by the form of his contract he became answerable at all events, and unconditionally, for the payment of the note. And it is contended that this is the legal effect of the contract of guaranty into which he entered

It is somewhat extraordinary, that the nature of this contract, and the extent of the liability it creates, are not very clearly settled in the books. It has been sometimes held to be an absolute, sometimes a conditional obligation. Sometimes a guarantee has been deemed a surety, and at others, not more than an indorsee. And this perhaps has arisen from the different forms in which the contract has been made. In several cases,

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where the party put his name on the back of the note, without any words written over it at the time, he not being the payee of the note, he has been charged as an original promisor, being considered in the light of a surety, and he has been declared against as such; but in these cases his signature was given at the time of making the note, or in so short a time afterwards, and under such circumstances, as to have relation to the making of the contract originally. The case of *Josselyn* v. *Ames* is of the first class, and that of *Moies* v. *Bird*, of the second. In other cases, the signature of a third party, not named in the note, has been given a long time after the making of the note, and without any circumstances showing that this third party had any concern in the original contract. Such was the case of *Ulen* v. *Kittredge*, 7 Mass. R. 233.

In the first class of cases, the holder of the note has been allowed to treat the person whose name is on the back, as a surety or original promisor, without any proof of consideration, other than as against the person who signed his name under the note, or of any actual promise on his part to pay, except what is derived from his signature to the note.[1] In the second class of cases, proof has been required of the promise or engagement to become liable, and he is to be charged in no other form than is consistent with that engagement; and it being a collateral engagement to pay the debt of another, there must be proof of a consideration for the promise.[2] The distinction is clearly stated in the case of *Hunt* v. *Adams*, 5 Mass. R. 361.

But the cases above cited, where the party signing on the back of the note has been held to be an original promisor, are where the signature is in blank, and not where a special undertaking is written over it. In such cases the party chargeable, the note not being negotiable, gives authority to the payee or holder to write over his signature such words as will bind him

[1] See *Leonard* v. *Vredenberg*, 8 Johns. R. 29; *Tenney* v. *Prince*, 4 Pick. 386; *S. C.* 7 Pick. 243; *De Wolf* v. *Rabaud*, 1 Peters's Sup. C. R 476; *Wheelright* v. *Moore*, 2 Hall, (New York,) 143; *S. C.* 1 Hall, 648; *Dearborn* v. *Parks*, 5 Greenleaf, 81.

[2] See *Aldridge* v. *Turner*, 1 Gill & Johns. 427; *Tenney* v. *Prince*, 7 Pick. 243; *Flagg* v. *Upham*, 10 Pick. 148; *Neelson* v. *Sanborne*, 2 N. Hamp. R. 414; *Read* v. *Cutts*, 7 Greenleaf, 190; *Elliott* v. *Giese*, 7 Har. & Johns. 457

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to the payment, not as indorser, for he cannot be such technically to a note not negotiable, but as promisor, surety or guarantee, at his election.[3] No such authority exists, where the tenor and form of the undertaking are already drawn out before the signature of the party.

In the case before us, the signature of the defendant was not 428
in blank, but under the words written by the cashier, the agent of the plaintiffs, which import a guaranty only. This is the only character in which he can be made liable, and if by law a guarantee is not an original promisor, he cannot be sued as such.

We therefore must consider what is the liability of a guarantee upon a promissory note; whether he is liable at all events, or only upon condition; and if the latter, whether the condition has been here performed.

This is the point which we think is undecided in this Commonwealth, though there have been many allusions to it in cases such as have been mentioned, in which the question was in relation to the liability of a surety, or of one who put his name on a note not negotiable, or where the party so putting his name had no authority to assign, not being the payee. But no case, in which the contract was in terms a guaranty, and so intended by the parties, has been presented to the Court. That a guarantee differs in character from a surety, cannot be questioned, for he cannot be sued as a promisor, as the surety may; his contract must be specially set forth. That he differs from an indorser is equally clear, and for the same reason; and also because he warrants the solvency of the promisor, which the indorser does not, he being answerable on a strict compliance with the law by the holder, whether the promisor is solvent or not. There are cases which adopt a distinction which is reasonable and just, in which the guarantee is discharged only by the joint effect of negligence on the part of the holder, and an actual loss or prejudice to the guarantee in consequence of that negligence. It is certainly conformable to the general principles of right and justice, that the creditor who knows of the delinquency of his debtor, and withholds information of it

[3] See *Seymour* v. *Van Slyck*, 8 Wendell, 403.

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from the guarantee, by reason of which the debt is actually lost, when it might have been saved by either, should not throw the loss upon the guarantee. It is contrary to the general principles of equity, upon which the law of contracts is considered to rest. Can it be supposed that a creditor holding the note of one thought to be in good credit, and who has ample means of paying, shall have a right, when he finds there is an inability
429 to take up the note on its becoming due, to receive partial payment, give further credit, and thus put the debt in jeopardy, and after he has indulged the debtor *ad libitum*, shall call upon the guarantee for the deficiency, when absolute insolvency has taken place and all other creditors have saved themselves out of his effects? This would offend all the analogies of the law, which require good faith and diligence, to enable a creditor to call upon parties consequentially liable, and would place a guarantee in a worse condition than a surety; who, being an original promisor, may take up the note when it becomes due and sue the principal immediately. The glaring injustice of such a position has been discountenanced by those courts which have had the question presented distinctly to them.

In 8 East, 242, Lord *Ellenborough* says the same strictness of proof is not necessary to charge the guarantee, as would have been necessary to support an action on the bill itself, that is, against an indorser, where, by the law merchant, a demand upon and refusal by the acceptors must have been proved in order to charge the other party on the bill, and this, not withstanding the bankruptcy of the acceptors. Guarantees insure the solvency of the principals, and therefore if the latter become bankrupt and notoriously insolvent, it is the same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them. *Lawrence* J. says, though proof of demand of the acceptors, who had become bankrupt, were not necessary to charge the guarantees, yet the latter are not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them. *Le Blanc* J. says, it is sufficient as against a guarantee, that the holder of the bill could not have obtained the money by making a demand upon the bill.

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And in 2 Taunt. 206, it was decided that a guarantee is entitled to notice, if the parties to the bill are not insolvent at the time it is due.

But the principle is more accurately and intelligibly stated by *Duncan* J. in the case of *Cannon* v. *Gibbs*, 9 Serg. & Rawle, 202. "I think," says he, "upon a review of these cases, the line is clearly marked out. It is this; that the guarantor is discharged, if notice is not given of non-payment to him, that he 430
may avail himself of proper presentment, demand and of due notice of non-payment where the drawer and indorser, or either of them, are solvent at the time the note became due. But where both are then insolvent, this would be *primâ facie* evidence that a demand on them, and notice to the guarantor, would be of no avail, and therefore, the giving notice to a guarantor, not a party to the bill, would be dispensed with, the presumption being, that the guarantor was not prejudiced by the want of notice."

And this seems to be the true ground; for it leaves the loss upon the party whose gross negligence is the cause of loss to any one, instead of throwing it upon him who would suffer entirely from the carelessness of the party who would recover of him. Upon this principle we decide the present case in favor of the defendant, without trenching at all upon the decisions relating to the liability of sureties, or those who, by signing their names in blank upon notes not negotiable, are regarded as *quasi* sureties; this being clearly a contract of guaranty only, in its form, and subject to the rules which govern that species of contract. It is clear that both the promisors in the note were solvent when it became due, and that they had abundant property liable to attachment. But the plaintiffs, with the knowledge of their delinquency, lay by nine months, during which time their property was sacrificed and all hopes of obtaining payment were by that means lost.[1] Some intima-

[1] *Salisbury* v. *Hale*, 12 Pick. 424; *Thomas* v. *Davis*, 14 Pick. 355; *Green* v. *Dodge*, 2 Hammond, 430; 3 Kent, (3d edit.) 123; *Read* v. *Cutts*, 7 Greenleaf, 186; *Sage* v *Wilcox*, 6 Connect. R. 81; *Allen* v *Brightmore*, 20 Johns. R. 365; *Douglass* v. *Reynolds*, 7 Peters, 113; *Breed* v. *Hillhouse*, 7 Connect. R. 523; *Wooley* v. *Sargent*, 3 Halsted, 262; *Grice* v. *Ricks*, 3 Devereux, 65; *Bradley* v. *Carey*, 8 Greenleaf, 234; *True* v *Harding*, 3 Fairfield,

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tions were made in the argument, that it was the usage of the bank, when notes have been discounted, to suffer a renewal from time to time, on the payment of a certain portion of the sum loaned, as the notes should become due. It is not stated in the case agreed, that there was such a usage, or that the defendant knew of it. If at the time he gave his guaranty there was any such usage, or any stipulation to that effect, and this was known to the defendant, it may be questionable whether the want of notice would avail him in defence.

Plaintiffs nonsuit.

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431 GEORGE MUNYAN, Petitioner, &c. *versus* HENRY COBURN.

An enlistment in a volunteer company of militia is not dissolved by the soldier's removing out of the limits of the regiment to which the company is attached, into the limits of another regiment within the same brigade, and performing duty in a standing company belonging to this last mentioned regiment.

THIS was a petition for a writ of *certiorari* to a justice of the peace, by whom the petitioner had been fined for neglecting to meet with the company of riflemen in the town of Dudley, in September, 1827, at a company muster and a regimental review. It appeared that the company was chartered by the governor and council in June, 1824, to be raised within the limits of Dudley, to be annexed to the fourth regiment in the first brigade and sixth division, and to recruit within that town. The petitioner enlisted into the company in May, 1825. Early in the spring of 1827 he removed with his family from Dudley, about eight miles, to the adjoining town of Oxford, and in the autumn he performed militia duty in the standing company in Oxford. This company belonged to the fifth regiment of the same first brigade. The petitioner never obtained, nor applied for, a discharge from the rifle company.

The *certiorari* was prayed for on the ground, that as the company of riflemen was attached to the fourth regiment, it

195; *Hall* v. *Rand*, 8 Connect. R. 561; *Bayley* v. *Hazard*, 3 Yerger, 487 *Williams* v. *Granger*, 4 Day, 444; Chitty on Contr. (4th Am. ed.) 397.

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was not competent for the commanding officer of that company to travel out of the limits of that regiment, in pursuit of a private who had removed therefrom and was doing duty in the standing company where he resided.

The case was argued in writing.

Barton, for the petitioner, referred to act of Cong. May 8, 1792, c. 33, § 4; *St.* 1809, c. 108, § 16, 25; *St.* 1825, c. 153, § 4; *Commonwealth* v. *Cummings*, 16 Mass. R. 194; *Webber, Petitioner, &c.* 3 Pick. 264.

Washburn, for the respondent, cited *St.* 1809, c. 108, § 34, *art.* 14, 15; *Ex parte Gallup*, 1 Pick. 463; *Webber, Petitioner, &c.* 3 Pick. 265; *Commonwealth* v. *Thaxter*, 11 Mass. R. 386; *St.* 1821, c. 92, § 5; *Thayer* v. *Stacey*, 3 Pick. 506.

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PARKER C. J. delivered the opinion of the Court. The question in this case is, whether the contract of enlistment in the rifle company raised in Dudley under authority of the governor and council, was dissolved by the voluntary removal of the petitioner into the adjoining town of Oxford, which is without the limits of the regiment to which the company is attached, though within the brigade of which that regiment is part.

And we are of opinion, that such dissolution of the contract is not produced by such a removal. The restriction under which the authority to raise the company was given, to wit, that it should be raised within the limits of the town of Dudley, does not necessarily import, that the members who enlisted were exonerated from their contract by a voluntary removal. The object of the restriction must have been, to prevent the standing companies of other towns from being broken in upon; and that purpose is answered by a restraint upon the enlistment. And it may often happen, that the removal to another town does not carry the member further from the centre of his company, than he was before, or than many of the members who remain within the town; and no inconvenience to the member who removes will necessarily result from continuing his connexion with the company, which he assisted to form. And it seems to be a suitable case for the discretion of the brigadier-general, to whom is committed by law the duty of

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deciding upon applications for a discharge, and who, it must always be presumed, will exercise his authority with due regard to the personal circumstances of the applicant, as well as the interests of the militia in general and the particular company to which the applicant may belong.

It must be considered, that by the law then in force, the members of volunteer companies had a right to continue their connexion, notwithstanding their removal, upon producing a certificate of their equipments and that they did active duty in such companies. This proves that the mere removal is not a dissolution of the enlistment.

There ought to be some act, therefore, upon which the dissolution should rest, other than a mere removal; and that should be an application to the brigadier-general for a discharge.

435 We think that the case of the *Commonwealth* v. *Cummings*, differs from this. In that case, the petitioner had removed out of the limits of the brigade; of course beyond the jurisdiction of the brigadier-general. He had a right so to remove, and being there, the presumption was strong, that he could not, without great personal expense and inconvenience, attend the trainings of the company to which he had belonged. An application to the brigadier-general would have been useless, and therefore was not required. In this case, the party remains within the brigade and subject to the jurisdiction of the brigadier-general, and therefore ought to be held to apply to him for a discharge.

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DORCAS PUTNAM, Petitioner, *versus* SYLVANUS PUTNAM *et al.*

It seems that where a man has been divorced on account of his adultery, a marriage by him in this State, during the life of his first wife, is void.

But if he, being a resident in this State, for the sake of evading the law, goes into a neighbouring State where such a marriage is valid, and is there married and immediately returns and continues to reside here, the marriage is valid here, and after his death his widow is entitled to dower in his estate.

THIS was an appeal from a decree of the judge of probate disallowing the claim of the petitioner for dower in the estate of John Putnam, deceased. The following facts were agreed by the parties.

On June 14, 1793, John Putnam was lawfully married to Anna Cox, in this Commonwealth, where he then, and until his death, had his residence and domicil. In September, 1817, the marriage was dissolved by a decree of divorce by this Court, for the cause of adultery committed by him. On December 15, 1819, his former wife being still living, he was married in Connecticut to the petitioner. Previous to the latter marriage, both he and the petitioner resided in Sutton, in this county; and immediately after the marriage they returned to Sutton, where they resided until his death. The petitioner, previous to her marriage, knew of his former marriage, and that his first wife was then living; and the divorce, 434
and the cause of it, were notorious in the vicinity of his residence.

The case was argued in writing.

J. Davis and *Allen*, for the respondents, cited *St.* 1785, *c.* 69, § 2; *St.* 1784, *c.* 40, § 2; *West Cambridge* v. *Lexington*, 1 Pick. 506; *Prentiss* v. *Savage*, 13 Mass. R. 20; *Pearsall* v. *Dwight*, 2 Mass. R. 84; *Greenwood* v. *Curtis*, 6 Mass. R. 358; *Barber* v. *Root*, 10 Mass. R. 260.

Sibley and *A. Denny*, for the petitioner, in addition to some of the authorities on the other side, cited *Commonwealth* v. *Putnam*, 1 Pick. 139; 1 Bl. Com. 88, Christian's note, 19, 2 Kent's Com. 79, 98, 100; *Commonwealth* v. *Green*, 17 Mass. R. 515; *Robinson* v. *Bland*, 2 Burr. 1079; *Compton*

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v. *Beaucroft*, Bull. N. P. 113; *Medway* v. *Needham*, 16 Mass. R. 157.

PARKER C. J. delivered the opinion of the Court. The claim of the petitioner for dower comes before us under the most unfavorable circumstances. She married a man who had been recently divorced for the cause of adultery, she without doubt knowing the fact, and the parties crossed the line between this State and Connecticut, were married in the latter State, and immediately returned to his domicil within this State; so that it is a clear case of evasion of the laws of this Commonwealth. Nevertheless we are constrained by authority to consider the marriage legal, and that the petitioner is entitled to all the privileges belonging to the relation of a married woman.

It is agreed that the marriage was lawful in Connecticut, so that had the parties remained there, their children would be lawful issue, entitled to inherit there, and according to the principles of the case of *West Cambridge* v. *Lexington*, 1 Pick. 503, would have a settlement derived from their father, and be entitled to inherit his estate here. In the case of *Medway* v. *Needham*, 16 Mass. R. 157, it was decided that a marriage, which would be void if entered into within this State, was valid, being made in Rhode Island, where it was lawful, and this, notwithstanding the parties went there for the purpose of doing what by the laws of this State was unlawful,
435 and immediately returned to dwell within this State. This decision covers the whole ground of the present case, and to decide this against the petitioner would be to overrule that decision. The Court were aware of all the objections to the doctrine maintained in that case, and knew it to be *vexata quæstio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage, which by the laws of the country where it was entered into was valid. The condition of parties thus situated, the effect upon their innocent offspring, and the outrage to public morals, were considered as strong and decisive reasons for giving place to the laws of the foreign country, not merely on account of comity, for that would not be offended

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by declaring null a contract made in violation of the laws of the State in which the parties lived, by evasion, but from general policy; nor will the same principle be necessarily applied to contracts of a different nature, — usurious, gaming, or others made unlawful by statute or common law; for comity will not require that the subjects of one country shall be allowed to protect themselves in the violation of its laws, by assuming obligations under another jurisdiction, purposely to avoid the effect of those laws.

The law on this subject having been declared by this Court ten years ago, in the case before cited, it is binding upon us and the community until the legislature shall see fit to alter it. If it shall be found inconvenient, or repugnant to sound principle, it may be expected that the legislature will explicitly enact, that marriages contracted within another State, which if entered into here would be void, shall have no force within this Commonwealth.[1] But it is a subject which, whenever taken into consideration, will be found to require the exercise of the highest wisdom.

Decree of judge of probate reversed

[1] Provision has been made for such a case by Revised Stat c. 75, § 6. See also c. 75, § 4; c. 130, § 2; 2 Kent, (3d edit.) 92, 93; *Dickson* v. *Dickson*, 1 Yerger, 110; *Conway* v. *Beazley*, 3 Haggard, (Doct. Commons,) 639; Story's Comm. on Confl. Laws, 117.

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MOSES HOLDEN *versus* WILLIAM EATON

Where no return had been made to the clerk of the District Court, of a sale of land for the United States direct tax of 1815, to enable him to give a deed to the purchaser, it was *held*, that in order to maintain an action by the purchaser against the collector for not causing such a return to be made, by means of which neglect the plaintiff lost the title and possession of the land, it was necessary for the plaintiff to prove that the tax was granted by Congress, that it was duly assessed, and that all the proceedings necessary to give validity to the sale, except those which it was the duty of the defendant to perform, were legally had, so that it should appear that the plaintiff's losing the land was owing to the defendant's neglect.

Proof that the defendant was collector, and that the person who made the sale was his deputy, and that the defendant had received from another person who acted as principal assessor, a list of the taxes in his district, will not throw on the defendant the burden of proving that the tax was not legally assessed.

THIS was an action on the case against the defendant, as a collector of the direct tax of the United States under the act of Congress of January 9, 1815, for the misconduct of his deputy, Learned Davis.

The declaration alleged, that a direct tax was duly granted by the act of Congress passed January 9, 1815, and that the same was duly assessed, and that on January 28, 1819, Davis sold to the plaintiff certain parcels of land, the owners of which had neglected to pay the taxes due thereon; that no part of the land was redeemed within two years from the time of the sale; [the period for redemption allowed by the statute;] that at the expiration of three months from that period, neither the defendant, nor any other officer in his collection district, lodged with the clerk of the District Court any statement relative to the lands sold and unredeemed, so that the clerk might give a deed of the same; but that the defendant still neglected and refused to make or cause to be made and lodged with the clerk the returns required by the act of Congress, by reason of which the plaintiff had lost the title and possession of the land which he had purchased.

A new trial having been granted, (see *Holden* v. *Eaton*, 7 Pick. 15,) the case was again tried, before *Putnam* J.

It was admitted that the defendant was collector, and that Davis was his deputy, and that the defendant, on January 3, 1816, had advertised in the National Ægis, that the direct tax had become due, and that he, and his deputies named in the

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advertisement, would attend to receiving it at the days and places specified; and that the lands were advertised by Davis for sale on January 28, 1819; and it was proved that the lands were sold on that day to the plaintiff, as alleged in the declaration.

It was also admitted, that no return relative to the land sold and unredeemed, was ever made to the District Clerk's office.

To prove that Nathan Fisher was principal assessor of the defendant's collection district, the plaintiff offered the following receipt, signed by the defendant; "Received this first day of January, A. D. 1816, from Nathan Fisher, principal assessor for the 16th district for the State of Massachusetts, a list of taxes payable on lands, lots, dwellinghouses, under the act of Congress of January 9, 1815, by persons residing within the same, amounting to fifty-eight thousand nine hundred and twenty dollars. *William Eaton*, collector for the 16th district for the State of Massachusetts."

The plaintiff offered no other evidence that Fisher was principal assessor; and this was objected to by the defendant as insufficient.

The plaintiff called Jabez Fisher, who testified that certain books and papers which were produced, were kept by his father, Nathan Fisher, since deceased. The books and papers were then admitted in evidence, though objected to by the defendant. The books purported to be "general lists of lands, dwellinghouses, and improvements, subject to the United States direct tax within the assessment district composed of," &c.; also a "list of taxes payable under the acts of Congress of 18th January and 3d March, 1815, on lands, lots, dwellinghouses, and slaves within the county of Worcester in the State of Massachusetts, by persons residing within the same."

The papers purported to be descriptive lists of the property liable to be taxed; but it did not appear by whom the lists were made.

Here the plaintiff rested his case. The defendant objected that he was not entitled to recover, because no evidence was offered by him to prove certain facts, enumerating thirty-one, each of which he insisted was essential to the validity of the tax. The following are given to show their character.

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1. That the principal assessor divided his district into a convenient number of assessment districts.

4. That the secretary of the treasury established regulations for, and gave instructions to, the principal assessors, relative to the assessment of the tax.

11. That the principal assessor, or some assistant assessor, called on all persons liable to be taxed for lands, &c. to exhibit a written list of their property liable to be taxed, and to disclose the particulars thereof to such assessor, or that any such lists were made.

19. That the principal assessors of the several collection districts in the State did convene and form a "board of principal assessors," at a time and place for that purpose fixed by the secretary of the treasury.

26. That the board of principal assessors apportioned to each district its proper quota of the tax.

On these thirty-one objections of the defendant, the judge directed a nonsuit; which was to stand, unless the whole Court should be of opinion that the plaintiff had shown sufficient to support his action; in which case a new trial was to be granted.

Sept. 29th. *Newton*, for the plaintiff, contended that the evidence given at the trial was sufficient to support the action, and throw the burden of proof on the defendant, if he disputed the legality of the assessment of the tax. The receipt of the defendant and his advertisement were sufficient proof that Fisher was *de facto* principal assessor, which is all that the plaintiff was bound to prove. *Rex* v. *Verelst*, 3 Campb. 432. The plaintiff had a right to suppose, from the acts of the defendant, that the sale of the land would convey a good title; if the assessment was in fact illegal, the plaintiff, who was deceived and injured by the defendant's representations, ought not to suffer, but the defendant. Stark. Ev. 28, 31, 32.

Merrick, for the defendant. The plaintiff was bound to allege, and consequently to prove, that the tax was duly assessed. This he has not done. In order to support his action, he must prove that he lost the land in consequence of the defendant's neglect; but even if the defendant had done every thing required of him, it would have been of no avail, if the

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tax was not legal. *Albee* v. *Ward*, 8 Mass. R. 79 ; 3 Stark. Ev. 1340 *et seq.* ; *Colman* v. *Anderson*, 10 Mass. R. 105 ; *Stetson* v. *Kempton*, 13 Mass. R. 272 ; *Bland* v. *Smith*, 1 Holt, 589. If the tax was not legal, the plaintiff has lost nothing by the defendant's neglect.

Holden v. Eaton.

PARKER C. J. delivered the opinion of the Court. The plaintiff avers in his declaration, that the tax was duly granted by an act of Congress, and was duly assessed. Upon the trial he did not show the legality of the assessment, relying upon certain acts of the defendant, viz. advertising the land for sale, and his declaration in the advertisements, and his receipt of the lists, in which he recognised Fisher as the principal assessor ; and he insisted that the burden of proof was on the defendant to show illegality in the proceedings, in order to avoid the effect of negligence in his duty, as to making return to the district clerk. There is in the report an enumeration of all the matters and things supposed by the defendant to be essential to the validity of the tax, and which he contends it was incumbent on the plaintiff to prove, in order to sustain his action. The only evidence offered by the plaintiff was the receipt signed by the defendant as collector, which is stated in the report ; and the books of the principal assessor produced by his son, he being dead. It seems to have been admitted, that proof was necessary of many, if not all, of the points enumerated by the defendant in his objections to the sufficiency of the evidence, and the case has been argued before us solely on the question, whether the burden of proof was on the plaintiff or the defendant. *Oct. 5th.*

We have no doubt that it was necessary for the plaintiff to show that the tax was granted by Congress, and that it was duly assessed, and that all the proceedings, except those which fell within the duty of the defendant, were legally had ; because the gravamen of his writ is, that by the omission or negligence of the defendant, he was deprived of a title to land which otherwise he would have enjoyed.

And this ground seems to be admitted by the plaintiff's counsel ; but he insists that he had shown enough to shift the burden of proof upon the defendant, by the receipt before mentioned. and by the books of Nathan Fisher, purporting to

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be kept by him as principal assessor. We think he has failed to maintain this position; he ought to have proved affirmatively on his part, so much as was essential to the validity of the sale by auction, except what the collector was bound to do himself. The officer does not warrant, nor is he responsible, for the prior proceedings. It is analogous to a sheriff's sale of goods under our laws. The sheriff is not answerable for any defect of title in the purchaser, which was not occasioned by himself, unless he should bind himself further by covenants. If he should be sued by a purchaser, for a loss of the goods sold, it must be proved that the execution came regularly into his hands, and that the loss was owing to some negligence or omission of his own.

In this case many defects are supposed to exist, fatal to the plaintiff's title, even if the collector had done what he is charged with having omitted to do; and if these defects actually exist, the plaintiff would have gained nothing as to his title under the purchase, had the collector made the return to the district clerk; so that no loss is imputable to the defendant.

Nonsuit made absolute

COMMONWEALTH *versus* JOSIAH HALL *et al.*

Where a writ of *certiorari* to the Court of Sessions had been granted upon the application of a turnpike corporation, because the court, without giving notice to the corporation, had issued a warrant for empannelling a jury to assess the damages sustained by an individual by the location of the turnpike road over his lands, but pending the petition for the *certiorari*, the corporation, in order that they might enter upon the land and make their road within the period allowed by their charter, paid the damages assessed by the jury, it was *held*, that the payment could not be considered to be voluntary, and that the writ of *certiorari* ought not to be quashed as having issued improvidently.

A WRIT of *certiorari* to the Court of Sessions was granted in this case, at April term 1828, because they had issued a warrant for empannelling a jury to assess the damages sustained by the respondents by reason of the location of the Central Turnpike road over their land, without having given notice to the turnpike corporation to show cause why such warrant should not issue. At October term 1828, the respondents moved

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that the writ might be quashed as having improvidently issued, because, during the pendency of the petition for a *certiorari*, the corporation paid the damages assessed by the jury and costs, and entered upon the land and made their road. This motion was argued at the same term, and again at the present term.

J. Davis and *Sibley* supported the motion. The statute requires that an application for a jury should be made at the term of the Court of Sessions next after the acceptance of the return of the committee. That time has gone by; so that if the proceedings shall be quashed, the corporation will hold the land and recover back the price of it, leaving the respondents remediless. The only security upon which the landholder can rely, is given by *St.* 1807, *c.* 113, which provides, that a turnpike corporation shall not, without the consent of the owner, enter upon land, until they shall have paid or tendered the damages ascertained by the committee authorized to assess the same. In the present instance it is believed that the franchise yields no income to which the respondents might have recourse for indemnification.

The granting of a *certiorari* is a matter of discretion, and the Court will not order one for mere defects of form. *Ex parte Miller*, 4 Mass. R. 565.

Here there has been an acquiescence by the corporation so far as to take the land for the damages found, and the Court will not set aside the damages and leave the land incumbered by the way. *Commonwealth* v. *New Milford*, 4 Mass. R. 446.

The Court will not, upon *certiorari*, quash the proceedings of an inferior court, unless the parties can be restored to the situation they were in when the error happened. *Monnell* v. *Weller*, 2 Johns. R. 8. Here the respondents will lose the benefit of a jury.

Where there has been an accord with satisfaction of a judgment, it will not be reversed upon *certiorari*, although it was erroneous. *Potter* v. *Smith*, 14 Johns. R. 444. In the present case the corporation have voluntarily paid the damages. It is no answer to say they tendered by compulsion, for that they could not otherwise obtain the land. They made the tender in order to get the equivalent.

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Newton, contrà, said that when this verdict shall be set aside, the case will stand right if the respondents refund the costs of the verdict, together with the difference between the damages assessed by the jury and the estimate of the committee.

Oct. 5th

Per Curiam. The only ground relied on for quashing the writ is, that while the petition for it was pending, the corporation voluntarily paid the damages assessed by the jury; and this payment is considered by the respondents as an acquiescence in the justice of their claim. If there had been a voluntary payment and acquiescence, with a full knowledge of all the circumstances, the corporation ought to be concluded. But they contend that this was in the nature of a compulsory payment; that they were obliged to make the tender before they could enter upon the land; and that they would otherwise have lost their franchise, as the time allowed them by their charter for making the road had nearly expired. And undoubtedly, if a person, in order to enable himself to enjoy his legal rights, pays a demand, the validity of which he contests, this cannot be binding on him as a voluntary payment. The payment having been made by the corporation without any intent to acquiesce, it ought not to affect their rights.

As to the suggestion respecting the responsibility of the corporation, it is sufficient to say, that the respondents will have a right to retain the money they have received, except so much as shall be adjudged to be repaid.

But the question is, whether, by sustaining this writ, that injustice would be done which would show that it ought not to be sustained. Unless we can ascertain that the verdict is more correct than the estimate of the committee, we cannot say that injustice will be done by quashing the proceedings. It depends on that fact. The jury might have partial views, or the committee might.

It is said the court will not quash proceedings, unless they can restore the parties to their former situation. But this cannot be a general rule. As, suppose a verdict to have been fraudulent; it would be the duty of the Court to quash the proceedings, although the fraudulent party might thereby be injured.

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It is objected that the defect here is matter of form. But we do not consider it to be so. The ground of complaint is want of notice; which is important.

Motion to quash the writ overruled.

RUFUS SHUMWAY *et al. versus* MICAH M. RUTTER.

In the case of a sale of chattels *bonâ fide* and for a valuable consideration, slight evidence of a delivery is sufficient; and if the vendee, with the consent of the vendor, obtains possession before any attachment or second sale, the transfer is complete, without a formal delivery.

Thus where furniture in a tavern was sold and the vendee took a lease of the house and went to live there and used the furniture in common with the vendor, who had occupied the house under a previous lease, and who continued to live there and keep the tavern, and afterwards the vendor removed to another house, carrying the furniture with him and using it as his own, and it was there attached as his property, it was *held*, that there was sufficient evidence of a delivery, to make the sale complete.

Where the owner of chattels suffers them to be mixed with those of another person, so that they cannot be distinguished, an officer will not be liable to an action of trespass (nor, *it seems*, to any action) for attaching them as the property of such other person.

But if after the attachment, such owner points out his goods to the officer and demands a redelivery of them, and the officer notwithstanding sells them, the sale will be a conversion.

If such owner exhibits to the officer a bill of sale of articles of the same kind with others attached by him, with which they were intermixed so as to be undistinguishable, the officer will be justified if he selects and gives up the least valuable articles corresponding with the bill of sale.

TROVER for divers articles of household furniture attached by the defendant, a deputy sheriff, as the property of Jacob Shumway.

The articles formerly belonged to Jacob Shumway, and were in a house in Shrewsbury, owned by one Eager and occupied by Jacob S. The property having been attached by Eager, the plaintiffs, in order to aid Jacob S., satisfied the debt due to Eager, and purchased the furniture, at an appraisement, taking a bill of parcels of it for their indemnity.

The sale was *bonâ fide* and for a full consideration. At the same time a lease of the house was executed by Eager to the plaintiffs, but Jacob S. continued to occupy it for four or five months, and then removed, taking the furniture with him,

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to Sudbury, where he commenced keeping another public house, and where he purchased additional furniture. There was no delivery of the furniture at the time of the sale; which was made at the distance of about two miles from the house in Shrewsbury; nor was there any contract by which Jacob S. was to have the use of the furniture.

To prove a delivery of the furniture, the plaintiffs called two witnesses, F. Nichols and Lucy Newton.

Nichols testified, that the property was given up to the plaintiffs at the house which was leased to them; that Rufus Shumway came there and said that he had paid for the property; that this took place within a month after the attachment made by Eager. On cross-examination, Nichols said that the property was not moved after Eager's attachment was given up; that no person was present at the time of the above conversation, which took place in the bar-room, except Rufus and the witness; that nothing more was done or said upon the subject of giving up the property, to the knowledge of the witness, and that Jacob continued to use the furniture exactly as if nothing had occurred.

Lucy Newton testified that she lived at the house of Jacob, when Eager attached the property. Rufus came there in April, and stayed until October, and used part of the property which was attached, just when he wished. It remained in the house as it had done, until Jacob removed to Sudbury On cross-examination, she said that Rufus lived at the house of Jacob, in the room called No. 2, and had his wife and two children there; that there were some articles of furniture in that room, which he used; that he brought very little furniture with him, but he brought a bed; and it appeared from her testimony, that the property now in question was used indiscriminately, as well by Jacob as by Rufus, during the time that Rufus lived at the house. She testified that she never perceived any difference in the ownership or possession of the property, between the state of things before Rufus came there, and while he remained there, and after he went away; that from the time of the attachment by Eager until Jacob's removal to Sudbury, Jacob kept the tavern himself, and used and treated the property in all respects as his own.

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There was no evidence of any symbolical delivery, or of any actual delivery of the whole or any part, unless it is to be inferred from the facts above stated.

The jury found that the plaintiffs went to the house, after they had the lease, and with the intent to take possession, and that they took possession of the furniture by the permission of Jacob, under the bill of sale. But the defendant objected, that the evidence would not warrant the finding of the jury.

At the time when the defendant attached the furniture at Sudbury, Jacob represented the whole property attached, as belonging to himself. A great variety of furniture other than that afterwards claimed by the plaintiffs, and of the same description as a part of the property claimed by them, was, at the time of the attachment, in the possession of Jacob, and all of it was indiscriminately mingled together, and was all attached at the same time. Afterwards, when the plaintiffs claimed the property sued for, the defendant desired Rufus to designate the articles claimed by them. Rufus replied, according to the testimony of one witness, that he could not select all the articles; according to the testimony of others, he replied that he could not distinguish his property. The bill of sale was however shown to the defendant, and he desired Rufus to designate the articles belonging to the plaintiffs, but Rufus could not distinguish them from the other furniture in Jacob's possession. Jacob was also requested to point out the property which belonged to the plaintiffs, but he said that he could not identify it. The defendant contended, that the plaintiffs could not maintain this action, by reason that their property, if they had any, was thus intermingled with the property of the debtor.

The jury found a verdict for the plaintiffs; and they settled the question of fraud in their favor.

If there was sufficient evidence of a delivery, and if the plaintiffs could maintain the action, notwithstanding they could not designate their property, the verdict was to stand; otherwise the plaintiffs were to become nonsuit.

Merrick, for the defendant, insisted that there was not sufficient evidence of possession being taken by the plaintiffs. *Lanfear* v. *Sumner*, 17 Mass. R. 110; *Lamb* v. *Durant*, 12 Mass. R. 54; *Smith* v. *Dennie*, 6 Pick. 262; *Bailey* v.

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Ogden, 3 Johns. R. 399; *Patten* v. *Clark*, 5 Pick. 5. *Beaumont* v. *Crane*, 14 Mass. R. 400; 3 Stark. Ev. 1190, 1191. These articles of furniture would be considered as in the possession, order and disposition of Jacob Shumway, within the meaning of the statute of 21 *Jac.* 1, c. 19, if that statute were in force here. *Collins* v. *Forbes*, 3 T. R. 316; *Storer* v. *Hunter*, 3 Barn. & Cressw. 368; *Tooke* v. *Hollingworth*, 5 T. R. 215; Com. Dig. *Bankrupt*, *D* 19, note *e*; *Chesterfield Manuf. Co.* v. *Dehon*, 5 Pick. 7.

Where the plaintiff's goods are so intermingled with those of the debtor, as not to be distinguishable, trover will not lie against the officer until the plaintiff points out his goods and makes a demand of them; according to the remark of *Parsons* C. J. in *Bond* v. *Ward*, 7 Mass. R. 123. The officer may demand a bond of indemnity where he has reason to doubt the ownership of the property to be attached; but where he has no cause of suspicion, he is not to require such a bond. That the goods here were so intermingled as to be incapable of being distinguished, was owing to the fault of the owners; and policy demands that the officer should be protected. *Marshall* v. *Hosmer*, 4 Mass. R. 60; *Perley* v. *Foster*, 9 Mass. R. 112.

J. Davis and *Allen*, *contrà*, cited in regard to delivery, *Bartlett* v. *Williams*, 1 Pick. 288; *Rice* v. *Austin*, 17 Mass. R. 197; *Chaplin* v. *Rogers*, 1 East, 192; *Hodgson* v. *Le Bret*, 1 Campb. 233; *Anderson* v. *Scott*, ibid. 235, note; *Codman* v. *Winslow*, 10 Mass. R. 146.

The dictum of *Parsons* C. J. in *Bond* v. *Ward*, relied on by the defendant, is not supported by adjudged cases; there must be a wilful intermingling of the goods. Here however there was notice and a demand, and by aid of the bill of sale, the officer might have separated most of the articles belonging to the plaintiffs. The doctrine of a confusion of goods applies to articles, the portions of which, from their nature, cannot be distinguished, as corn, gold cast into a crucible, &c. but not to articles of furniture. 2 Bl. Com. 405; 3 Dane's Abr. 117. The circumstance that the plaintiffs could not distinguish every article will not prevent them from maintaining trover. Buller's N. P. 35; 3 Dane's Abr. 188, 189.

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PARKER C. J. delivered the opinion of the Court. We think that the case reported furnishes competent evidence of a delivery, and sufficient to support the verdict on that point. The transfer being *bonâ fide* and for a valuable consideration, slight evidence of a delivery would be sufficient; as is proved by the principle adopted of a symbolical delivery; and whether there is a formal delivery or not, if the vendee obtains possession by consent of the vendor, before any attachment or second sale, the transfer is complete.

In this case, the vendees took a lease of the house in which the furniture was. Nothing was wanting on the former trial, but evidence of an entry under the lease, to prove a delivery or possession. On this trial that defect has been supplied; so that the sale was perfect.

But the vendor was allowed to re-possess himself of the furniture and remove it into another house in another town and county, and to use and claim it as his own, without any contract with the vendees. This circumstance necessarily created suspicion and difficulty. Persons dealing with the vendor, who in his own name occupied a public house with this furniture in it, would naturally consider him the owner, and would probably trust him on that account. If the statute of James were in force here, there is no doubt but that the furniture would be deemed the vendor's; for he had the entire order and disposition of it. But that statute is a branch of the bankrupt system, and is not applied, even in England, except in cases affected by that system. There was a similar provision in the bankrupt law of the United States.

With us, the possession and use of chattels by the vendor, after a perfect transfer, is only evidence of fraud, and may be explained to be consistent with the fairness of the sale.[1]

But the difficulty of this case now, as before, arises from the intermingling of the chattels sold to the plaintiff and those afterwards purchased and put into the house by the vendor. If the owner of a part can distinguish and point out to the officer what belongs to him, the officer would be a trespasser if he should take it. But he is obliged to attach the goods of the debtor,

[1] See Long on Sales, (Rand's edit.) 115, 116, and cases cited in note: *Wheeler* v. *Train*, 3 Pick. (2d edit.) 257, and note 1.

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notwithstanding they may be so mixed; and it is the business of the owner, who has allowed them to be so confused, to separate his own from the debtor's.

448 In this case, it was Jacob Shumway the debtor, who caused the mixture; but he was placed in a situation to do this by the vendees. They do not lose their property thereby, if they can prove it. They may, after an attachment, identify their goods, give notice to the officer and demand a re-delivery of them; but until they do that, the officer is not in fault, and cannot be considered a trespasser.

But the question arises, whether the plaintiffs shall lose their property altogether, because they were unable to distinguish it from other articles of the same description owned by the vendor. If there were a fraudulent collusion between the vendor and vendees to embarrass the sheriff and prevent him from attaching the property of the debtor, this consequence might follow; but on the supposition of an honest inability to distinguish, it would be harsh. There is nothing in the case to justify us in taking the ground, that their conduct was collusive.

The officer was not a trespasser in taking the goods, as he was bound to take the goods of the debtor. But could he sell them without being liable for their value? In the action of trover, proof of property and of conversion is sufficient. The proof is clear that property of the plaintiffs was taken. This taking, under the circumstances, may not have been a conversion. But the officer was made to know, that divers of the articles were claimed by the plaintiffs, and the bill of sale was shown to him before he sold. He chose to sell the whole, having it in his power to require indemnity, and probably taking it. Finding that there were many articles of the same kind, he would have been justified, under the circumstances, in selecting from the whole quantity in his hands, enough to correspond with the bill of sale; and if he retained the most valuable, no fault could have been found with him.

He should have set aside as many articles as appeared by the bill of sale to belong to the plaintiff and sold the residue; for he had notice of the claim, and the evidence of property was shown to him. In the case of *Bond* v. *Ward*, which has

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been cited, it was held that no action lies against the attaching officer, under such circumstances, without a demand and refusal; that is, he cannot be a trespasser or liable in trover without such demand. This applies to the taking. If he sells, knowing the property to be the plaintiffs', the sale is a conversion.[1]

Judgment according to verdict

DANIEL CLAPP, Petitioner, *versus* WILLIAM WATSON.

Where a captain of a company of militia certified on the warrant of a sergeant, that such sergeant "has been appointed clerk of said company and has taken the oath necessary to qualify him to discharge the duties of his office," without dating the certificate, it was *held*, that the captain (then become major) might amend by affixing the date, and also that parol evidence of the time was admissible; that the oath must be presumed to have been administered by the captain; and that the certificate was sufficient, though it did not set forth the oath which was administered.

CLAPP, as clerk of a company of militia commanded by Jabez Green, made a complaint before a justice of the peace, against Watson, for neglecting to perform military duty on the first Tuesday of May, 1828. At the trial before the justice it appeared, that Clapp was appointed on the 12th of September, 1827, a sergeant of the company, which was then under the command of captain Alonzo Temple, and upon his warrant was the following certificate:--- "This certifies that Daniel Clapp, one of the sergeants of the company under my command, has been appointed clerk of said company, and has taken the oath necessary to qualify him to discharge the duties of his office. Alonzo Temple, Capt."

Watson objected that the appointment and certificate of qualification of the complainant were informal and insufficient. The complainant then moved that Temple, who at the time of the trial was major of the regiment to which the company was attached, might amend the certificate, by affixing the date when

[1] See *Lewis* v. *Whittemore*, 5 N. Hamp. R. 366; *Holbrook* v. *Hyde*, 1 Vermont R. 286; *Treat* v. *Barber*, 7 Connect. R. 275; *Ryder* v *Hathaway*, 21 Pick. 298; *Sawyer* v *Merrill*, 6 Pick. 478.

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the appointment and certificate were made and the oath administered; but the motion was overruled.

The complainant then offered Temple as a witness to testify that he administered the oath in September, 1827, and that the certificate was made and signed by him at the time of administering the oath. But the evidence was rejected as incompetent; and the justice adjudged that the certificate of the appointment and oath of office was informal and insufficient; and that Watson was not guilty in manner &c.

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And now, upon the complainant's petition for a writ of *certiorari* to the justice, it was insisted by *J. Davis* and *Allen*, for the respondent, that the want of a date to the certificate was fatal; *St.* 1809, *c.* 108, § 8; *Sherman* v. *Needham*, 4 Pick. 66; *Commonwealth* v. *Sherman*, 5 Pick. 239; but it was *resolved* by the Court, that the captain should have been allowed to amend, and also that his testimony was admissible in regard to the time of making the certificate.

It was also objected, that the oath does not appear to have been administered by the captain; but it was *resolved*, that this must be presumed. *St.* 1809, *c.* 108, § 8; *Commonwealth* v. *Cummings*, 16 Mass. R. 194.

It was further insisted, that the certificate should have set forth the oath which was administered, so that the Court might judge whether it was the oath required by law; *Lancaster* v. *Pope*, 1 Mass. R. 86; but it was *resolved*, that the certificate was sufficient in this respect.

Washburn, for the petitioner.

Certiorari awarded.[1]

[1] See Revised Stat. *c.* 12, § 51, 112; *Smith, Petitioner*, 15 Pick. 446.

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HUTCHINS HAPGOOD *versus* ISRAEL HOUGHTON, Executor.

Repugnancy between a protestation and an averment in a replication, is not a ground of demurrer.

In assumpsit against an executor, the defendant pleads that the testatrix devised land to the plaintiff in lieu and satisfaction of his demand, and that the plaintiff accepted the devise; the plaintiff, protesting that the testatrix did not make the devise in lieu, &c. and that the will was not proved, replies that he did not accept the land devised, concluding to the country. *Held*, that the replication was good.

The executor pleads, that the plaintiff was requested to make his election to take or refuse the devise, but that he refused to elect; the plaintiff replies that he did refuse to accept the devise, traversing the allegation that he refused to elect; the executor rejoins that the devise has not been waived by the plaintiff, concluding with a verification. *Held*, that the rejoinder is bad, as being a departure, and because it does not join the issue tendered by the traverse.

The executor pleads that the plaintiff did not waive or refuse the devise; the plaintiff, protesting as before, replies that he did waive and refuse to accept *any* devise contained in the will concluding to the country. *Held*, that the replication was good.

ASSUMPSIT for the board of Susan Grout, the defendant's testatrix, from June 1, 1821, to April 29, 1824.

The defendant pleaded, 2. that the testatrix devised to the plaintiff and his wife twenty-five acres of land in lieu and in satisfaction of his demand; that the will was proved; and that after the probate of the will the plaintiff accepted the land so devised.

3. As to so much of the cause of action as accrued before the 22d of April, 1824, that on that day the testatrix made her will, wherein she devised to the plaintiff and his wife twenty-five acres of land in lieu and satisfaction of so much of his demand as had then accrued; which will was proved; that after the probate of the will, the defendant requested the plaintiff to make his election to take or refuse the devise; but that he then refused and has hitherto refused to make such election.

4. As to so much &c. [as above] that the plaintiff has not hitherto waived or refused the devise, although he has had knowledge thereof ever since the decease of the testatrix.

The plaintiff, in his replication to the second plea, protesting that Susan Grout did not devise to him and his wife twenty-five acres of land in lieu, &c. and protesting that the will has never been proved, says, that he did not accept the lands so

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devised, &c. and this he prays may be inquired of by the country.

In replication to the third plea, the plaintiff, protesting that Susan G. did not devise, &c. and that the will has never been proved, says, that he refused to accept *any* devise contained in the will, in lieu and satisfaction of so much of his demand &c. and has ever since refused and still does refuse to accept the same in lieu &c. ; without that, that he did refuse to elect to take or refuse the devise.

In replication to the fourth plea, the plaintiff, protesting as before, says he did waive and refuse to accept any devise contained in the will ; concluding to the country.

To the replication to the second plea, the defendant demurs for the following causes : —

1. Because the plaintiff has protested the devise set forth, and has also denied and traversed that he accepted the same ; which protestation and denial are repugnant and insensible, inasmuch as the protestation denies that any such devise was made, and the traverse of the acceptance admits the devise.

Also, for that the matters protested by the plaintiff are essential and necessary parts of the second plea, and issue might have been taken on those matters by the plaintiff.

Also, for that the plaintiff has not traversed any allegation in the second plea, but has replied generally, that he did not accept any lands devised to him, and prayed that the same may be inquired of by the country.

To the replication to the third plea the defendant rejoins, that Susan G. did devise twenty-five acres of land to the plaintiff and his wife, &c. which devise has not been and is not waived by the plaintiff ; and this he is ready to verify.

To the replication to the fourth plea the defendant demurs, for the two first causes (*mutatis mutandis*) assigned in regard to the replication to the second plea ; and 3. for that the plaintiff has not taken issue upon any allegation, or replied that he had waived the particular devise mentioned in the plea, but has replied that he did waive *any* devise contained in the will ; which is nonsensical and no answer to the fourth plea.

The plaintiff joins in the foregoing demurrers.

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To the rejoinder to the replication to the third plea, the plaintiff demurs for the following causes: —

1. Because the rejoinder is a departure from the plea, in this; — the plea alleges that the defendant requested the plaintiff to make his election to take or refuse the devise, but that the plaintiff refused to make such election; the replication traverses that allegation; and the rejoinder alleges that the devise has not been and is not waived.

2. The rejoinder alleges no new matter, or matter substantially different from that contained in the plea, and yet concludes with a verification, whereas it ought to have joined the issue tendered by the traverse in the replication.

Burnside and *Hinds*, for the plaintiff.

Bigelow and *Brooks*, for the defendant.

Per Curiam. The replications to the second and fourth pleas are unquestionably good, both containing a direct denial of the principal traversable fact set forth in the pleas, and being in good form. *Oct. 5th.*

As to the protestation and the averment being contradictory or inconsistent, we know of no such ground for sustaining a demurrer.

As to the third plea, the replication is suited to it, and the issue tendered should have been joined, instead of pleading further by a rejoinder; in which there is a palpable departure, as well as refusal to take issue upon the traverse.

COMMONWEALTH *versus* JONAS WHITE.

By *St.* 1785, *c.* 28, § 1, a person committing certain trespasses therein specified is subjected to a fine, to the use of the Commonwealth, to be recovered on complaint before a justice of the peace; and by *St.* 1800, *c.* 57, § 4, all penalties and forfeitures given or limited by any act, in whole or in part, to the use of this Commonwealth, may be recovered by indictment in any court proper to try the same. *Held*, that the Court of Common Pleas have original jurisdiction of the offences enumerated in the first section of the statute of 1785.

THE defendant was convicted on an indictment for perjury in his testimony before the grand jury for the Court of Common Pleas; which testimony related to the offence of break-

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ing glass, supposed to have been committed by certain persons, against the provisions of *St.* 1785, *c.* 28, § 1. The defendant moved in arrest of judgment, that the offence of breaking glass is, by the provisions of the statute, exclusively cognizable by justices of the peace; and therefore his testimony before the grand jury was extra-judicial.

The case was submitted without argument.

Davis, Solicitor-General, for the Commonwealth.

J. Davis and *Kendall*, for the defendant.

Oct. 6th. PARKER C. J. delivered the opinion of the Court. The question is, whether the Court of Common Pleas had jurisdiction of the offence, in regard to which the defendant is alleged to have committed the crime of perjury; if it had not jurisdiction, the whole matter was *coram non judice*, and therefore no oath could be lawfully administered.

By *St.* 1785, *c.* 28, this offence was to be prosecuted by a complaint before a justice of the peace; so that under that statute, the Court of Sessions, or its successor, the Court of Common Pleas, had no original jurisdiction. But by *St.* 1800, *c.* 57, § 4, it is provided, "that all penalties and forfeitures given or limited by any act of this Commonwealth, in whole or in part, to the use of this Commonwealth, may be recovered by indictment in any court proper to try the same."

By *St.* 1785, *c.* 28, which creates the offence in regard to which the defendant testified before the grand jury, the whole penalty was given to the Commonwealth; so that this case comes clearly within the words of *St.* 1800, *c.* 57, § 4. The only question therefore is, whether the Court of Common Pleas was the proper court for the trial of the offence. As general authority was given to the Court of Sessions to try all misdemeanors for which the punishment was fine or imprisonment, and all the powers of the Court of Sessions in criminal matters are transferred to the Court of Common Pleas, the authority of the latter court is unquestionable.

Motion overruled.

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CALVIN LEFFINGWELL *et al. versus* SAMUEL D. ELLIOTT.

An act, incorporating individuals for a particular purpose, does not vest in the corporation, land previously owned by them as tenants in common and previously used for the same purpose.

Parol evidence is not admissible to show that a deed given by one of such tenants in common, of his share in the stock of the corporation, was intended to pass his share of the land.

If a grantee of land with warranty, being evicted by a paramount title, extinguishes such title for a nominal consideration, he can recover upon the warranty the amount of such consideration only, together with a reasonable compensation for any trouble and expense to which he may have been put in procuring the extinguishment.

THIS was an action for breaches of covenants against incumbrances and of warranty, contained in a deed of real estate, dated January 13, 1825, given by the defendant to the plaintiffs.

It was agreed that on the 28th of December, 1814, Eddy, one Watson, and fourteen others, were tenants in common, in fee simple, of seventy-five acres, parcel of the land conveyed to the plaintiffs, and that while they were so tenants, they used the same for the purposes of a manufacturing establishment, until June 13, 1815, when they were incorporated by an act of the legislature, (*St.* 1815, *c.* 3,) by the name of the Oxford Cotton Manufacturing Company. This parcel of seventy-five acres was never conveyed by Eddy and the other proprietors to the corporation, nor ever vested in the corporation, unless it so vested by force of the act of incorporation and by operation of law. The act of incorporation makes no allusion to this land, but merely authorizes the corporation to hold real estate. The corporation was organized agreeably to the statutes regulating manufacturing corporations, and the corporate stock was divided into a certain number of shares. The defendant derived his title, if any, to the seventy-five acres, by purchasing of the several corporators, for the time being, the whole of the shares, and taking as vouchers of such purchase certain corporation certificates, under seal, in the following form — "This certifies that A. B. is owner of share No. ——. value estimated at 1000 dollars;" — together with deeds of transfer, by

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which the corporators "give, grant, sell and convey, and to farm let" their respective "shares." The defendant gave a fair market price for the shares, considering them to embrace the seventy-five acres, and those persons of whom he bought were aware, that in making the purchase, he expected to acquire a title in fee to this land.

If the evidence was admissible, it was agreed that it could be proved, that the members of the corporation and the original owners of the real estate in question, considered the shares in the company to be made up of the real and personal estate in their possession, and supposed that by the act of incorporation the real estate was transferred to the incorporated company and would pass by the transfer of its scrip.

While the plaintiffs were in possession of the land conveyed to them, claiming to hold in fee simple, Eddy entered upon the seventy-five acres for the purpose of regaining seisin and possession thereof to the use of himself and others, he and they claiming to be owners thereof in common. Whereupon the plaintiffs yielded the possession, and took from Eddy a lease of his share for 999 years, for the consideration of one cent. The plaintiffs paid divers sums of money to the original proprietors for the purpose of obtaining from them acquittances of their supposed interest in the seventy-five acres. Some of these acquittances were obtained at the instance of the plaintiffs alone, and others at the joint instance of the plaintiffs and the defendant.

On the 8th of July, 1826, R. Newton levied an execution upon an undivided thirty-second part of a portion of the seventy-five acres, as the estate in fee simple of Watson, and thereby acquired the interest, if any, which Watson had in the same.

If the action could be sustained, an auditor was to be appointed to ascertain the damages.

Sept. 30th. *Newton* and *Barton*, for the plaintiffs, contended that the title to the seventy-five acres had not vested in the corporation, and that it did not pass by the transfer of the certificates of "shares" in the corporation stock. This land is not sufficiently described in the deeds of transfer; *Worthington* v. *Hylyer*, 4 Mass. R. 205; and the parol evidence offered to

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show that it was the intention of the parties to convey it, is not admissible. Leffingwell v. Elliott. 457

In regard to damages, they said the plaintiffs were willing to take the sum actually paid by them to extinguish the paramount title, if they were allowed a reasonable compensation for their trouble in effecting it; *Sumner* v. *Williams*, 8 Mass. R. 162; otherwise they claimed the value of the land at the time of the eviction. *Gore* v. *Brazier*, 3 Mass. R. 523.

J. Davis and *Allen, contrà*. The corporation property consisted of real and personal estate, and the whole passed by the deeds of the stockholders. The claim made by the grantors of the defendant was founded in fraud; and if the parol evidence is admissible, it appears they intended to convey the land now in question. To show that it was admissible, they cited *Thomas* v. *Thomas*, 6 T. R. 671; 3 Stark. Ev. 1021, 1026; *Doe* v. *Burt*, 1 T. R. 701; *Kerslake* v. *White*, 2 Stark. Rep. 508; *Powell* v. *Biddle*, 2 Dallas, 70; *Livingston* v. *Ten Broeck*, 16 Johns. R. 14; *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Leland* v. *Stone*, 10 Mass. R. 459; *Hatch* v. *Hatch*, 2 Hayw. 32.

Per Curiam. The mere incorporation of tenants in common to enable them to carry on more conveniently a common object, does not vest in the corporation a title to the land which had been previously used by the individuals for the same purpose. The title must be conveyed by proper deeds from the individuals to the corporation. The deed of a "share" in the present case could convey to the defendant only the incorporeal right which the grantor had in the corporation. No real estate was conveyed by it, nor did it contain a description of any land. It meant to grant only what was the subject of the corporation certificate, that is, the corporate property. It is clear then, there being no conveyance of the land in question to the corporation, and none by the individual owner to the defendant, that there was an outstanding paramount title; against which the plaintiffs have a right to be indemnified. Oct. 6th

In regard to damages, if the plaintiffs extinguished the paramount title for a nominal sum, they were entitled to recover no more of the defendant. If they were put to trouble and

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expense in procuring the extinguishment, that is a proper ground of damages.[1] The lease for 999 years is like an estate in fee, and it was for the benefit of the defendant to have the paramount title extinguished by a conveyance of that kind.

Oxford Bank *versus* Levi Lewis.

Where a promissory note was signed by B and H as principals, and by the defendant as surety, it was *held*, that the reception of interest in advance, of the principals, by the holders, after the note was overdue, did not discharge the surety.

Upon a case stated it appeared, that the action was brought upon a joint and several promissory note for 375 dollars, dated June 12, 1826, payable to the plaintiffs or order in fifty-seven days, and signed by Hollis Bruce and Rufus Houghton as principals, and Stephen Lawton and the defendant as sureties. In February, 1827, Houghton, in addition to two payments by him on the note in 1826, paid the interest for 60 days, in advance; but the sureties were not present at such payments. Houghton absconded on May 4, 1827, carrying off all his property with him; and Bruce failed in February, 1827. Notice of the non-payment of the note was given to the defendant in June, 1827.

The plaintiffs were to become nonsuit or the defendants to be defaulted, according to the opinion of the Court.

Sept. 30th. *Merrick*, for the defendant, contended that the receiving of interest in advance, without the knowledge of the surety, was a contract to delay the collection of the note and operated as a discharge of the surety. 3 Stark. Ev. 1390; *Hill* v. *Bull*, Gilmer, 149; *Jones* v. *Bullock*, 2 Bibb, 467; *Hunt* v. *Bridgham*, 2 Pick. 581; *Bellows* v. *Lovell*, 4 Pick. 153; *Gould* v. *Robson*, 8 East, 576; *English* v. *Darley*, 2 Bos. & Pul. 61; *Clark* v. *Devlin*, 3 Bos. & Pul. 365; *Smith* v. *Becket*, 13 East, 187; *Boultbee* v. *Stubbs*, 18 Ves. 20.

Barton, for the plaintiffs, cited *Orme* v. *Young*, 1 Holt's N. P. Cas. 87; *Hunt* v. *Bridgham*, *ubi sup.*; *Frye* v. *Barker*, 4 Pick. 382; *Crane* v. *Newell*, 2 Pick. 612.

[1] See *Swett* v. *Patrick*, 3 Fairfield, 9.

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PARKER C. J. delivered the opinion of the Court. The defendant was an original promisor, and is to be treated in all respects as such, though he is described in the note as a surety, unless some new contract has been made with those who are described as principals, which would prevent him from bringing an action. Mere delay to call on or sue the principal will not discharge the surety, as is settled in the case of *Hunt* v. *Bridgham*.

If the plaintiffs had, by any contract with the principals, disabled themselves from suing, or the surety from taking up the note in order to secure himself, a defence might be maintained. The only circumstance relied on to show this is, that after the note became due, they received the interest for sixty days in advance, which was by implication giving a new credit for that time. But they retained the power of suing and might, if they had apprehended a failure, have made an attachment. We see no ground of defence.[1]

Defendant defaulted.

[1] See *Freeman's Bank* v. *Rollins*, 13 Maine R. (1 Shepley,) 202; *Central Bank* v. *Willard*, 17 Pick. 150; *Blackstone Bank* v. *Hill*, 10 Pick. 129; 2 Pick. (2d edit.) 585 and cases cited in notes; 14 Wendell, 165; 10 Peters, 257.

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The President &c. of the Boston Bank *versus* Silas Reed Junior *et al.*

Where a mortgagee brings a writ of entry against the mortgager, without declaring upon the mortgage, and recovers a judgment at common law, by virtue of which he enters upon the mortgager, the mortgager is not liable in trespass for mesne profits.

So where the grantee of an equity of redemption conveyed the same to a stranger, but still continued in possession, and the mortgagee brought a writ of entry against him, not declaring on the mortgage, and recovered a judgment at common law and entered upon the tenant by virtue thereof, but showing no title except under the mortgage, it was *held*, that the tenant was not liable to the mortgagee for mesne profits.

Where the tenant in such writ of entry, denying his liability for mesne profits, nevertheless gave his promissory note to the mortgagee for a sum equivalent to the value of the mesne profits for a portion of six years, with the understanding, however, that if certain persons, to whom he was to apply, should say he was not liable, the note should be given up, but he never made such application, it was *held*, that he was not estopped to say that the note was without consideration and void.

Assumpsit on a promissory note, dated September 25, 1827, for 100 dollars, given by Silas Reed junior as principal and the other defendant as surety.

At the trial, before *Putnam* J., it was proved, that at the Court of Common Pleas, September term 1827, the plaintiffs
460 recovered judgment at common law, in a writ of *entry sur disseisin* against Silas Reed junior, in which they counted on their own seisin within thirty years and a disseisin by Reed A writ of possession on that judgment was regularly executed, and seisin of the demanded premises was delivered to the attorney of the demandants. The land recovered was formerly owned by one Chaddock, who mortgaged it to the demandants in 1803; and no evidence was offered by the demandants, of any title other than the mortgage. The right in equity was conveyed to Silas, who conveyed the demanded premises by absolute deed, dated December 4, 1824, to Lewis H. Reed, but continued in possession, as before, till September 25, 1827. Immediately after the execution of the writ of possession, and on the same day, Lewis conveyed all his interest in the land to the plaintiffs. No interest had been paid on the mortgage since 1814. On the same day the attorney of the plaintiffs demanded of Silas the rents and profits of the

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estate for three years next preceding the recovery in the writ of entry, or from the date of his deed to Lewis. Silas denied that he was liable in law to pay the back rent, but after inquiring of the attorney whether he was in fact liable to pay such rent, and being informed by him that in his opinion he was so liable, he consented that his tenant for the then current year should pay the plaintiffs the rent for that year, being 50 dollars, and that he would give his note as principal, with the other defendant as surety, for 100 dollars; with this understanding, however, that the defendants might take the opinion of three lawyers named, and if two of them should express an opinion that Silas would not be liable in an action of trespass for mesne profits, the note should be given up. The defendants were to make the application to those lawyers, and were to give notice to the plaintiffs' attorney, of the time of the application. No such application was ever made; and on the 21st of January, 1828, the attorney sent a letter to Silas, stating that as no such application had been made, he should consider the question as given up, and that the note would be paid. The present suit was commenced in February, 1828.

Upon the foregoing evidence the judge directed a nonsuit, with leave to the plaintiffs to move to have it taken off.

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Burnside now moved to take off the nonsuit. The plaintiffs claimed the rents and profits for six years, and Silas Reed junior thought he was not liable at all; and by way of compromise, he gave the note now in suit. If he had procured an opinion in his favor from the lawyers to whom the question of his liability was referred, the plaintiffs would have been bound by it; consequently the agreement was binding upon him. So that the question, whether he was liable in trespass for mesne profits, is no longer open.

But if the defendants would not be liable on the note, unless Silas was liable in trespass for mesne profits, it is apprehended that he was so liable. The record states a seisin within thirty years, but the evidence showed a seisin within twenty, Silas having entered upon the land in 1817; and this evidence, connected with the recovery, is conclusive evidence of a right to an action of trespass for mesne profits. *Emerson* v. *Thompson*, 2 Pick. 487; *Baron* v. *Abeel*. 3 Johns. R. 481; *Jack-*

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son v. *Randall*, 11 Johns. R. 405; Stearns on Real Actions, 421. The only ground of defence must be, that Silas R. entered upon the mortgager and that he stands in the situation of a mortgager. *Wilder* v. *Houghton*, 1 Pick. 87; *Fitchburg Cot. Man. Co.* v. *Melven*, 15 Mass. R. 268; *Gibson* v. *Farley*, 16 Mass. R. 280. If a mortgager should appear and move for the conditional judgment in a writ of entry at common law, the case would be like an action upon the mortgage; but if he lies by, he cannot afterward rely on the mortgage, in an action for the mesne profits. There is no privity of contract between the mortgagee and a purchaser of the equity of redemption; the mortgagee finds the purchaser in possession, without knowing how he came there, and if the purchaser lies by and suffers a recovery at common law, he must abide by the consequences. *Green* v. *Kemp*, 13 Mass. R. 519; *Partridge* v. *Gordon*, 15 Mass. R. 486; *Jackson* v. *Fuller*, 4 Johns. R. 215; *Keech* v. *Hall*, 1 Doug. 21.

All the right of Silas R. was transferred by him, and yet he remained in possession. He should be liable for the rents and profits at least from the time when he ceased to have any title. He might have pleaded that he was not tenant to the freehold, but he did not, and he cannot now set up that defence in an action for the mesne profits.

462 *J. Davis* and *Allen*, *contrà*, contended that the note was void for want of a consideration, Silas R. not being liable to the plaintiffs for mesne profits. *Wilder* v. *Houghton*, *Fitchburg Cot. Man. Co.* v. *Melven*, *Gibson* v. *Farley*, and *Green* v. *Kemp*, before cited; *Freeman* v. *Boynton*, 7 Mass. R. 488; *Warder* v. *Tucker*, ibid. 449.

Oct. 6th. Wilde J. delivered the opinion of the Court. It has been argued for the plaintiffs, that the note, being given on the compromise of a doubtful and contested right, is binding; but we think it manifest that there was no compromise, as Silas Reed junior denied his liability, and that question was agreed to be submitted to the opinion of counsel; and as it has not been thus decided, it must be now determined in this action. It is generally true, that a judgment in a writ of entry is conclusive evidence of the right to recover in an action of trespass for mesne profits; but a judgment in favor of a mortgagee against the

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mortgager is an exception to the general rule; for the principle is well settled, that a mortgager is not liable for rents and profits. *Wilder* v. *Houghton*, 1 Pick. 87; *Fitchburg Cot. Man. Co.* v. *Melven*, 15 Mass. R. 268; *Mead* v. *Lord Orrery*, 3 Atk. 244; *Keech* v. *Hall*, 1 Doug. 20; *Higgins* v. *York Buildings Co.* 2 Atk. 107.[1]

The form of the action cannot affect the rights of the parties. But as the plaintiffs declared generally on their seisin, it was competent for them to show in this action, that they had an absolute indefeasible title to the land. This they have not attempted to show, and we must conclude, therefore, that their only title is under the mortgage. But they contend that Silas Reed junior was not in under the mortgager after his conveyance to his brother. We think however that this position cannot be maintained. After this conveyance he held as tenant at will or at sufferance under his brother. He certainly was not in under the mortgagee.

We are therefore of opinion, that the plaintiffs could not maintain an action of trespass for mesne profits on the facts reported; and consequently, that the note sued was given without consideration

Motion to take off the nonsuit overruled.

COMMONWEALTH *versus* The Inhabitants of NORTH BROOKFIELD. 463

An indictment against the town of N. B. for not repairing a highway, alleged that there was a highway leading from a meetinghouse in the town of B, to the dividing line between B. and N. B. and thence in N. B. to the meetinghouse in N. B., and that the defendants allowed "a certain part thereof, consisting of twenty rods in length," to be out of repair. *Held*, that the indictment was defective, inasmuch as it was left uncertain in which of the towns the unrepaired part of the highway lay.

THIS was an indictment, in which it was alleged, that there was "a certain common and public highway and town road in the town of North Brookfield in said county, leading and pass-

[1] See *Cavis* v. *M'Clary*, 5 N. Hamp. R. 530; *Pope* v. *Biggs*, 9 Barn. & Cresw. 245.

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Commonwealth v. North Brookfield.

ing from the Baptist meetinghouse in the town of Brookfield to the dividing line between the towns of Brookfield and North Brookfield, and thence in said North Brookfield by the dwelling of the widow Converse to the North Brookfield meetinghouse, &c. which said public highway and town road the inhabitants of the town of North Brookfield &c. are bound &c. to make, maintain, &c. and that the said inhabitants &c. did &c. and still do suffer, permit and allow a certain part thereof, consisting of twenty rods in length and two rods in breadth, to be deeply covered over with the waters of the pond, &c. so that the same cannot be used and enjoyed by the citizens &c. for a common highway," &c. to the common nuisance, &c.

At the trial, the defendants objected to the sufficiency of the indictment, and the jury having found a verdict against the defendants, the question was reserved for the consideration of the whole Court.

Sept. 30th. *J. Davis* and *Allen*, in support of the objection, cited *Rex* v. *Hartford*, Cowp. 111.

Merrick, for the Commonwealth.

Oct. 6th. *Per Curiam.* We think it very clear, that there is a defect in the description of the road, which is fatal to the indictment.

It is averred, that there is a public way and town road in the town of *North Brookfield*, leading and passing from the Baptist meetinghouse in the town of Brookfield to the dividing line between the towns of Brookfield and North Brookfield, and

464 thence in North Brookfield by the dwellinghouse of the widow Converse to the North Brookfield meetinghouse. And then it is averred, that the inhabitants of North Brookfield did permit and allow a *certain part thereof*, to wit, twenty rods, &c. to be out of repair. A certain part of what? Of a road described; which is partly in Brookfield and partly in North Brookfield; leaving it wholly uncertain, in which of the towns the unrepaired part of the road is. It should have been averred that a certain part thereof, lying in North Brookfield, &c. This objection being taken at the trial, the verdict must be set aside and the defendants discharged.

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SAMUEL STONE *versus* JOHN HOBART, Administrator, with the Will annexed, of William Watson.

A and B were sureties on a bond for C; a suit was brought on the bond, and A paid it; A died, and by his will made C his residuary legatee and devisee. A's estate was sufficient to pay all debts and legacies, and to leave a surplus for C, which however would not be sufficient to pay all the debts of C, who was insolvent. A's administrator sued B to recover a contribution from him as co-surety on the bond; and B brought a bill for an injunction against the suit at law *Held*, that this Court had no jurisdiction of the case under *St.* 1817, *c.* 87.

This Court refused to give an opinion, whether the facts stated were a defence to the suit at law, which was pending in the Common Pleas, although the parties had agreed to submit the question to this Court, and to be bound by the decision.

THIS was a suit in equity. The plaintiff's bill alleged, that during the life of the defendant's testator, the plaintiff and the testator became sureties for Samuel D. Watson, on a guardianship bond given by the latter as principal, to the judge of probate; that judgment was recovered on the bond against the three obligors, on which an execution issued, which was satisfied out of the estate of the testator.

The bill further alleged, that the testator's will made Samuel D. Watson, who was his only son, his executor, and residuary legatee and devisee; that Samuel D. Watson, being unable to give bonds as executor, the defendant was duly appointed administrator with the will annexed; that the personal and real property left by the testator was more than sufficient to pay all the debts and legacies due from the estate, and that a large balance would still remain for Samuel D. Watson, as resid- 466
uary devisee; that Samuel D. Watson, when his father died, was insolvent, and still continued so, though some of his creditors had satisfied their debts out of his interest in his father's estate.

The bill further alleged, that it was not necessary for the payment of the debts, legacies and charges due from the testator's estate, that the defendant, as administrator, should recover from the plaintiff, as co-surety with the testator, any part of the money paid by the testator on the bond; and if the defendant should recover any part of it from the plaintiff, he would hold it wholly in trust for Samuel D. Watson, the principal on the bond; and that if the defendant should pay it over

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to Samuel D. Watson, the plaintiff would be utterly unable to recover it back from the latter.

The complaint of the bill was, that the defendant, knowing the premises, had brought a suit in the Common Pleas against the plaintiff for the money paid by the testator on the bond, which action was still pending.

The plaintiff further showed, that he had not, in his opinion, any defence at law to the action; that the defendant's only claim to recover was as a trustee in law under the will, and in the settlement of the estate, of the deceased; and that in equity the defendant ought not to be permitted to recover in that suit.

The prayer of the bill was, that the defendant should be restrained by injunction from proceeding in his suit in the Common Pleas.

The defendant demurred to the bill.

The parties also filed an agreement in the case, by which they requested, that if the Court were of opinion that they had not jurisdiction or authority to grant the injunction, and yet that the facts stated in the bill would be a defence to the action at law, the Court would decide accordingly; and they agreed that the decision should be binding on the parties in the same manner as if that suit were pending in this Court.

Oct. 2d. *J. Davis* and *Washburn*, for the plaintiff. This Court has jurisdiction of this case under *St.* 1817, *c.* 87, giving them equity powers in "all cases of trust arising under deeds, wills or in the settlement of estates;" the administrator is the trus-

466 tee, Watson the *cestui que trust*, and the property devised is the trust property. *Dwight* v. *Pomeroy*, 17 Mass. R. 327; 1 Madd. Ch. Pr. 553, 577, 578, 286; *Winship* v. *Bass*, 12 Mass. R. 202; *Dawes* v. *Boylston*, 9 Mass. R. 352; *M'Kay* v. *Green*, 3 Johns. Ch. R. 56.

If the Court have jurisdiction, it is a proper case for an injunction; for Watson, the person for whose benefit the money is recovered, will become liable to repay it to the plaintiff as soon as the plaintiff has paid it to the defendant, the administrator. 1 Madd. Ch. Pr. 130, 134, 451, 455; Com. Dig *Chancery*, *D* 9; *Hill* v. *Turner*, 1 Atk. 516; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 336; Eden on Inj. 3; *Anony-*

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mous, 1 Atk. 491 ; Toll. Ex. 489 ; Coxe's Dig. 726 ; Tidd's Pr. 604 ; *Winch* v. *Keeley*, 1 T. R. 622 ; *Ward* v. *Lewis*, 4 Pick. 523 ; Com. Dig. *Princ. and Surety, H ; Miller* v. *Ord*, 2 Binney, 382 ; *Praed* v. *Gardiner*, 2 Cox, 86 ; *Hanson* v. *Gardiner*, 7 Ves. 307 ; *Foster* v. *Spencer*, 2 Johns. Ch. R. 171 ; *Boultbee* v. *Stubbs*, 18 Ves. 20 ; *Simson* v. *Hart*, 14 Johns. R. 63, 74, 75.

Newton, for the defendant, contended that the Court had no jurisdiction under the statute of 1817. *Hunt* v. *Maynard*, 6 Pick. 489. It is evident from the legislature's having expressly granted a power to issue injunctions in certain cases, that no such power was intended where it was not expressed. *St.* 1827, *c.* 88.

PARKER C. J. delivered the opinion of the Court. This bill shows a very clear case of equity ; but not such a one as is within the jurisdiction of this Court ; and the remedy for the plaintiffs must be at common law. We have no power in chancery, except by statute ; and the general authority to issue injunctions has not been given. The exercise of such a power exists only when the subject matter falls within the jurisdiction granted by the legislature ; such as the case of trust created in the manner prescribed in *St.* 1817, *c.* 87, or partnerships, waste or nuisance, provided for in subsequent statutes. Injunctions against proceeding at law are within the general jurisdiction of chancery, which we are not authorized to assume. But it is insisted that Hobart, against whom the bill is filed, is a trustee within the meaning of *St.* 1817, *c.* 87 ; because, being administrator of William Watson, and Samuel D. Watson being residuary legatee, Hobart should be considered a trustee on a trust arising in the settlement of an estate. We have not been able yet precisely to ascertain the meaning of the legislature in this last branch of trusts, specified in the act giving this Court equity jurisdiction. If thereby an executor or administrator is rendered a trustee and liable to this process, we think it must be only in favor of heirs, legatees, creditors or others interested in the settlement and disposition of the estate. There is certainly no relation of trustee and *cestui que trust* between the present plaintiff and the administrator. They stand in the relation only of debtor and creditor. This bill

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must be dismissed; and we decline determining, extrajudicially, whether the matter alleged will constitute a defence in the suit at law, pending against the present plaintiff in favor of Hobart, as administrator. That question must come before us in another shape.

JONAS WHITE *versus* HEMAN RAY.

Where in an action for a malicious prosecution it appeared that the defendant had caused the plaintiff to be twice indicted, and that the attorney of the Commonwealth had entered a *nolle prosequi* on the second, "it appearing that the accused has been formerly acquitted of the offence charged against him in this indictment," it was *held*, that the defendant might notwithstanding show that the second indictment was for a different offence from the one first charged, and that so there was probable cause for the second accusation.

There is a material variance between an indictment "for drawing and depositing in and across a highway a quantity of stones," and one "for building a stone-wall in and upon the same highway;" and in an action for a malicious prosecution brought against the prosecutor of the last-mentioned indictment, it being proved that the plaintiff was guilty of the offence therein charged, and it not appearing, upon proper averments, that the two indictments were for the same offence, it was *held*, that the defendant had shown probable cause for the prosecution.

THIS was an action for a malicious prosecution in procuring an indictment against the plaintiff for a nuisance, in 1826.

The supposed nuisance consisted in the plaintiff's having put his stone-wall in the highway, in Westminster. It was proved that the plaintiff was indicted in 1817, upon the complaint of the defendant, for having, on the 5th day of April of that year, "drawn and deposited a quantity of large stones in
468 and across said road," and that he was tried and acquitted. The indictment of 1826, which was also procured upon the defendant's complaint, alleged that on the first day of January 1825, the plaintiff "caused to be built a certain stone-wall in and upon a part of the common and public highway and town road aforesaid, to wit, upon two thousand square feet of the said common and public highway," &c. At the December term 1827 of the Common Pleas a *nolle prosequi* was entered upon this indictment, "it appearing," says the attorney of the Commonwealth, "by a copy of a record filed in the case, and of the affidavit appended thereto, that the defendant has been

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formerly acquitted of the offence charged against him in this indictment."

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It was proved that the wall stands about eighteen inches within and upon the highway; and that the foundation of it remained in 1826, and ever since, as it was in 1817, having been erected by the defendant previously to the year 1817; but the defendant, after he was acquitted in 1817, brought stones into the road and laid them upon the old foundation, and built the wall higher than it was, but did not make it project further into the road; and the defendant has repaired it since the year 1817, by laying up the stones which have fallen from time to time.

The jury were instructed, that these facts did not prove a probable cause for the last prosecution. The instruction was with a view to have the opinion of the jury upon the question of malice, and of damages if they should find malice; it being considered that the want of probable cause was evidence of malice, but not conclusive evidence; and the defendant relied upon various facts to disprove malice.

The jury found a verdict for the plaintiff. But if the whole Court should be of opinion that the facts proved did amount to probable cause for the prosecution of the last indictment, the plaintiff was to become nonsuit.

Merrick, for the defendant. Entering the *nolle prosequi* does not show a want of probable cause. *Commonwealth* v. *Wheeler*, 2 Mass. R. 172; 2 Hale's P. C. 346. Where a nuisance continues, it may be the subject of a new indictment, and an acquittal on an indictment for the same nuisance at a former period, will not be a bar. *The King* v. *Wandsworth*, 1 Barn. & Ald. 63; *Rex* v. *Burbon*, 5 Maule & Selw. 392; *Rex* v. *Reynell*, 6 East, 316; 1 Stark. Ev. 223; 3 Stark. Ev. 672; 1 Chit. Cr. L. 452, 457; 2 Chit. Cr. L. 607, note *a*; 2 Hale, 241; *Rex* v. *Taylor*, 3 Barn. & Cressw. 502; *Standish* v. *Parker*, 2 Pick. 20; [2d edit. 22, notes;] Bac. Abr. *Nuisance*, *D*.

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Kendall, for the plaintiff, contended that a person once indicted for a nuisance and acquitted, cannot be indicted for the continuance of the nuisance; for it is the same offence. A person stealing goods in one county and carrying them into

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another, might as well be indicted of larceny in this last county after an acquittal in the first. 4 Bl. Com. 335; 2 Hawk. P. C. c. 35; *Rex* v. *Cohen*, 1 Stark. R. 516; *Rex* v. *Mann*, 4 Maule & Selw. 337; *The King* v. *Wandsworth*, 1 Barn. & Ald. 63; *Commonwealth* v. *Goddard*, 13 Mass. R. 455; 1 Stark. Ev. 222, 224.

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PARKER C. J. delivered the opinion of the Court. It was proved in this case, that the plaintiff erected and maintained a stone-wall, which lay eighteen inches within the highway, for obstructing which he was indicted by the procurement of the defendant. A *nolle prosequi* was entered upon the indictment, in 1827, by the county attorney for the Commonwealth, because, as he says, it appeared that the defendant had been formerly acquitted of the same offence.

The defendant in this action has a right, notwithstanding this entry, to show that there was probable cause for the last prosecution; and he does it, by showing the existence of the nuisance; unless the acquittal in the former prosecution is a bar to any subsequent indictment. And it can be no bar certainly, unless the offences in the two prosecutions are identical.

If the former acquittal had been pleaded in bar, it must have been averred, that the obstruction, for which he stood indicted, was one and the same with that of which he had been acquitted. Indeed some of the authorities cited maintain, that a second prosecution may be supported for the very same offence. But this we do not affirm.

Now by recurring to the indictment of 1817, and comparing it with that of 1826, it will appear, that there is a substantial difference between them. The charge in the former is, that
470 the plaintiff drew and deposited in and across the said road a *quantity of large stones*. In the latter the charge is, that he caused and procured to be erected and built a certain stone-wall in and upon a part of the common and public highway aforesaid. There is a material variance between the two; and he might well have been acquitted of the former, and convicted of the latter offence. It does not appear, nor could it, except by pleading with proper averments, that drawing and depositing large stones in and across the road, was the same act as the building a stone-wall on the road.

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It being proved then, that the plaintiff actually built a wall upon the road, there was probable cause for the prosecution; and therefore the verdict must be set aside and a nonsuit entered. White v. Ray

EBENEZER D. AMMIDOWN *versus* CALVIN WHEELOCK, Principal, and WILLIAM HEALY Junior, Trustee.

Where a debt has been assigned by the creditor, and the debtor is afterward summoned as his trustee, in order to entitle the assignee to the benefit of his assignment, it is not necessary that he should give notice of it to the debtor before the service of the trustee writ on him; it is sufficient if the notice is given at any time before he has made his answer.

Where such an assignment is disclosed in the answer, and the assignee desires to become a party to the suit under *St.* 1817, *c.* 148, and the Court of Common Pleas refuses to let him become a party, he may bring the question before this Court by a bill of exceptions, and upon a reversal of the decision below, may have a jury trial before this Court.

In order to entitle the assignee to become a party under the statute, it is not necessary that he should offer to the person summoned as trustee, any evidence of the assignment, beyond his own statement; it is sufficient if he gives the trustee, before his answer, notice of what appears to be a valid assignment.

Where a note not negotiable is assigned, and the maker is subsequently summoned as trustee of the payee, in order to entitle the assignee to become a party to the suit, it is not necessary that he should exhibit the note to the trustee when he gives the trustee notice of the assignment.

IN the Common Pleas the trustee made the following disclosure.

On October 11, 1828, he made a note not negotiable, by which he promised to pay the defendant 56 dollars on demand with interest. He was summoned in this action *early in the evening* of the same day, he thinks between *six and seven o'clock*. A few days afterwards Smith Tourtellott informed him, that he, Tourtellott, had purchased the note of the defendant, and requested the trustee to pay it to him, Tourtellott. He then informed Tourtellott of the service of the trustee process upon him. Tourtellott, on November 29, 1828, handed the trustee a written notice signed by Tourtellott, in the following words, viz. "This is to give you notice, that I purchased a note of hand [describing the note above mentioned]

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on the same day of the date of said note, about *three of the clock* in the afternoon of the said day. I sold said Wheelock a pair of oxen, and took the abovementioned note towards the payment of said oxen." The notice was accompanied by a certificate signed by the defendant, that he had transferred the note to Tourtellott, as stated by Tourtellott. The trustee, in the afternoon of October 11, before the service of the writ upon him, saw the defendant's boy driving a pair of oxen which the trustee supposed to be the same which Tourtellott stated that he had sold to the defendant.

At the next term of the Common Pleas after the answers were given, and before the court had given any opinion upon them, Tourtellott appeared, and presented a petition, in which he requested the court to permit him to become a party to the suit, in order that he might have a jury to try the validity of the assignment, according to the statute; but the court refused to grant the petition, and adjudged Healy to be trustee.

To this refusal and judgment Tourtellott filed exceptions

Oct. 3d.

Lee and *Bottom*, for Tourtellott. Tourtellott, as assignee, was entitled to become a party to the suit and have the validity of the assignment tried by a jury. *St.* 1817, *c.* 148, § 1; *Adams* v. *Robinson*, 1 Pick. 461. If the plaintiff disputes the validity of this assignment, he also has the right of having it tried by a jury, which is all that he can reasonably require. *Gordon* v. *Webb*, 13 Mass. R. 215. There was no neglect in Tourtellott in giving notice of the assignment, for it is well settled that a notice given at any time before the trustee answers is sufficient. *Foster* v. *Sinkler*, 4 Mass. R. 450; *Dix* v. *Cobb*, 4 Mass. R. 508. A negotiable note may be assigned

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by delivery, without any indorsement or other writing, and *a fortiori*, a note not negotiable. *Jones* v. *Witter*, 13 Mass. R. 304.

Tufts, for the plaintiff. The remedy provided by the statute of 1817, is not applicable to this case, because the trustee's answer does not show any assignment of the debt. In order to entitle the assignee to the benefit of the statute, he should have offered the trustee some evidence of the assignment. *Foster* v. *Sinkler*, 4 Mass. R. 450; *Wood* v. *Partridge*, 11 Mass. R. 488; *Comstock* v. *Farnum*, 2 Mass. R.

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96. In the present case the assignee did not exhibit to the trustee any assignment, nor did he produce the note; and he has not even offered an affidavit to prove the assignment.

Ammidown v. Wheelock and Tr.

Oct. 6th

PARKER C. J. delivered the opinion of the Court. We think enough was disclosed to entitle the supposed assignee of the note to a trial by jury of the validity of his assignment. The respondent disclosed, that after giving his note to Wheelock, and after service of the trustee process on the afternoon of the same day, Tourtellott informed him that the note had been assigned to him, and stated the consideration he had given for it; that Wheelock, after the service of the trustee process, also certified to him that he had assigned the note to Tourtellott for a yoke of oxen purchased of him in the manner stated by Tourtellott; and the trustee himself saw Wheelock's boy driving off the cattle which had been Tourtellott's, on the afternoon of the day on which the note bears date. We think this is *primâ facie* evidence of an assignment, which, if *bonâ fide*, would pass the equitable interest in the note to Tourtellott, notwithstanding he did not present it to the trustee when he gave him notice of the assignment; and notwithstanding the trustee had no notice until after the service of the writ upon him.

By *St.* 1817, *c.* 148, whenever any person, summoned as trustee, shall disclose an assignment to another, of goods &c. of the principal in his hands, and the plaintiff in the suit shall object that the assignment ought not to have effect to defeat his attachment, and the court shall think it just or convenient that the assignee shall become a party to the suit, the person so stated to be assignee may, for the purpose of trying the validity of his assignment, become a party &c.

It was contended by the counsel for the plaintiff, that the power of the Court of Common Pleas over this subject was discretionary, and that no appeal would lie from its decision, whether the assignee shall be admitted a party or not; but we cannot think such was the intention of the legislature, especially as it is provided in the latter part of the first section of the statute, that either party may appeal from any judgment of the court as in other cases. 473

It was also contended, that in order to give the assignee a

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right under the statute, there must be a disclosure of an assignment perfect in its form, and one which would be valid unless fraudulent. We think the answers of the trustee in this case disclose sufficient to bring the case within the statute. He was informed by both assignee and assignor that the note had been transferred, before he was served with process; and though the notice was not given until afterwards, the assignment might be good. It seems to us to be a case in which the testimony of the debtor, who stands indifferent between the plaintiff and the assignee, would be essential to the right of the case.

The judgment of the Court of Common Pleas is reversed, and the case stands for trial here; the assignee to become a party, giving bond according to the statute.[1]

The Inhabitants of Millbury, Petitioners, &c. *versus* The Blackstone Canal Company.

A town which is obliged to maintain a highway, through which a canal has been constructed, not being the owner of the soil, is not entitled to damages under a statute providing for the assessment of damages to the owners of the land through which the canal passes.

Petition for a writ of *certiorari* to the County Commissioners. The petition stated, that the Blackstone Canal Company have located and constructed a canal through and over six public highways within the limits of Millbury; that the petitioners, being injured by reason of the premises and aggrieved by the doings of the commissioners appointed for the purpose
474 of estimating all damages which any person or corporation might sustain by reason of the construction and location of the canal, presented a petition that a jury might be empannelled to assess their damages, and that the county commissioners adjudicated that the prayer of their petition ought not to be granted.

The *St.* 1822, *c.* 27, incorporating the Blackstone Canal Company, provides in § 8, that when the corporation shall have located the canal, they shall make a report to the Court

[1] See Cushing on Tr. Proc. 102, note 3. Revised Stat. *c.* 109, § 15 to 21.

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of Sessions, containing "the names of the owners of the land," and that commissioners shall estimate all such damages as they shall think any person or corporation shall sustain by the opening of the canal "through his or their land."

Oct. 3d.

Merrick, in support of the petition, contended that so far as respects this statute, the soil in the highway must be considered as owned by the town, though in respect to the original proprietor they have only an easement. The soil taken away by the respondents belonged to the petitioners; they had a right to it for the purpose of amending the highway. They became liable to maintain six bridges over the canal, and they think themselves entitled to remuneration.

J. Davis and *Allen*, *contrà*. The town have no land in the highway; the claim for damages should have been made by the owner of the soil.

The inhabitants of the town have not the easement; it belongs to the Commonwealth; and the remedy for an injury to a highway is an indictment at the suit of the Commonwealth. Bac. Abr. *Highways*, *B*; 2 Bl. Com. 35; *Spear* v. *Bicknell*, 5 Mass. R. 125; *Strout* v. *Berry*, 7 Mass. R. 385.

Oct. 6th.

Per Curiam. The town not being owners of the land under the highway,[1] and through which the canal passes, are not entitled to any damages.

Petition dismissed: costs for the respondents.

[1] See *Tyler* v. *Hammond*, 11 Pick. 214; *United States* v. *Harris*, 1 Sumner, 37; 3 Kent, (3d ed.) 432, 433; *Adams* v. *Emerson*, 6 Pick. 57.

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JONATHAN DAVIS *versus* DAVID ESTEY *et al.*, Administrators.

Where an original administration is granted in another of the United States, and an ancillary administration, in this State, and the estate is insolvent, a creditor in this State is entitled to a *pro ratâ* dividend only, although the assets in this State are sufficient to pay his demand in full.

Where an original administration was granted in another State, and a commission of insolvency was issued, of which no notice was given to a creditor in this State until after the commission was closed, and ancillary administration was granted here, but no commission of insolvency was issued, and the creditor brought an action against the ancillary administrator, it was ordered that he should recover a judgment for his whole debt, upon which he would be entitled to a *pro ratâ* dividend, but that no execution should issue.

UPON a case stated it appeared, that this action was brought to recover the amount due on a promissory note, made by David Hicks, the defendants' intestate. Hicks, at the time of his death, resided in Vermont, where administration was granted to the defendants. They represented the estate to be insolvent, on January 4, 1827; and commissioners were appointed, agreeably to the laws of Vermont, for the purpose of adjusting the claims of the creditors. The commissioners gave due notice, received the claims of creditors, and made a return of their commission, with a list of the claims allowed by them. The amount of the claims allowed by the judge of probate in Vermont exceeded the value of the real and personal estate of the intestate. No notice of the issuing of the commission was given to the plaintiff, either personally or by advertising in this Commonwealth, till after the commission was closed; and his claim was not presented to the commissioners or allowed by the judge of probate. The intestate was the owner of real estate in this Commonwealth. The administrators took out letters of administration here, and obtained license to sell the real estate for the payment of the debts. No commission of insolvency was issued here and the property here was sufficient to pay the demand of the plaintiff in full. Notice of the plaintiff's claims was given to the administrators, before the assets in this Commonwealth were withdrawn therefrom.

Oct. 3d *J. Davis* and *Allen*, for the defendants, cited *Dawes* v. *Head*, 3 Pick. 128.

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Davis v. Estey. Oct. 6th.

Barton, for the plaintiff, said, that the plaintiff claimed only a *pro rata* dividend, out of the property of the intestate.

Per Curiam. The property received in Vermont by the administrators is to be accounted for there; but the property in this Commonwealth is liable, to a certain extent, to the debts here. As the estate is insolvent, a creditor here is not to be paid his whole debt to the prejudice of creditors in Vermont, but only a *pro ratâ* dividend. There is no difficulty in this case as to the *modus operandi*. Judgment is to be taken for the whole debt, but no execution is to issue. The administrators will ascertain the amount of the assets and debts in both States, and pay the creditors here, *pro ratâ*. They will be protected in Vermont for what they are compelled to do here by our law.[1]

The Inhabitants of WARD *versus* The Inhabitants of OXFORD.

In an action brought by the town of W against the town of O, for expenses incurred in the support of a pauper, on the question whether the pauper derived a settlement in O from his grandfather through his father, it was *held*, that copies of a deed, executed by the grandfather in 1754, in which he was described as being of O, and of his last will, made in 1758, in which he was described as "now resident in O," were admissible evidence to prove that the grandfather gained a settlement in O, under *Prov. St.* 12 & 13 *Will.* 3, *c.* 10.

Held, also, that evidence proving that the grandfather, for a long time before 1754, had a settlement in the town of S, and that afterward, for years previous to 1784, the father of the pauper was supported as a pauper by S, was admissible to rebut the presumption arising from the description of the grandfather in the deed and will.

THIS was an action brought to recover the expenses incurred in the support of Abner Putnam and his family, paupers, whose settlement was alleged to be in Oxford. At the trial, in the Common Pleas before *Strong* J., the plaintiffs contended that

[1] Provision is made for such a case by the Revised Stat. *c.* 70, § 23 *et seq.* See *Porter* v. *Heydock*, 6 Vermont R. 374; *Harvey* v. *Richards*, 1 Mason, 381; *Jennison* v. *Hapgood*, 10 Pick. 77; *Miller's Estate*, 3 Rawle, 312; *Hooker* v. *Olmstead*, 6 Pick. 481; *Olivier* v. *Townes*, 14 Martin, 93, 99; *De Sobry* v. *De Laistre*, 5 Harr. & Johns. 193, 224; Story's Comm. on Confl. Laws 423; 2 Kent. (3d ed.) 433, 434; *Dawes* v. *Head*, 3 Pick. (2d ed.) 144, note.

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Ward v. Oxford.

the settlement of Abner Putnam was derived from his grandfather, Elisha Putnam, through his father. In order to prove that the settlement of the grandfather was in Oxford, they offered in evidence a registry copy of a deed of land, dated September 30, 1754, executed by him, in which he was described as being of Oxford; and a copy of his last will, dated May 20, 1758, in which he was described as "now resident in Oxford."

477 The defendants objected to the admission of this evidence, but it was admitted by the judge; and it was read to the jury, as evidence of the grandfather's gaining a settlement in Oxford under *Prov. St.* 12 & 13 *Will.* 3, *c.* 10.

The defendants then offered evidence to prove that the grandfather, for a long time before the year 1754, had a legal settlement in Sutton; and that afterwards, for a series of years previous to 1784, the father was supported as a pauper by that town; but did not offer to prove that his legal settlement was in that town. But this evidence was rejected by the judge.

The jury returned a verdict for the plaintiffs. The defendants filed their exceptions to the foregoing directions of the judge.

Oct. 3d. *Barton*, for the defendants. The descriptions of the grandfather in the deed and will are mere hearsay evidence, and are not the less inadmissible because reduced to writing. 1 Phillips on Ev. 186, 195; *King* v. *Erith*, 8 East, 539; *Bartlet* v. *Delprat*, 4 Mass. R. 702; *Gray* v. *Goodrich*, 7 Johns R. 95; *Davis* v. *Wood*, 1 Wheat. 6. The words "now resident in Oxford," used in the will, indicate a temporary residence only.

J. Davis and *Allen*, for the plaintiffs, in order to show that the will and deed were admissible in evidence, cited 1 Stark. Ev. 307; *Brune* v. *Rawlings*, 7 East, 279; *Higham* v. *Ridgway*, 10 East, 109; *Doe* v. *Robson*, 15 East, 32; *Doe* v. *Pembroke*, 11 East, 504. The evidence offered by the defendants, in regard to the settlement of the grandfather in Sutton, was rightly rejected, for it has no tendency to prove that he had a settlement there, at the time when we show it to have been in Oxford. The fact of the father's subsequently receiving relief as a pauper in Sutton, is no evidence of his settlement

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there. *King* v. *Chaderton*, 2 East, 27 ; *King* v. *Chatham*, 8 East, 498.

Ward v. Oxford. Oct. 6th

PARKER C. J. delivered the opinion of the Court. We think the registry copy of the deed and the copy of the will were properly admitted in evidence, as facts tending to show that the residence of the grandfather was in Oxford ; from which his settlement, under the then existing pauper laws, might be inferred by the jury. We consider this species of evidence as different from the mere verbal declaration of a pauper as to his residence, which has been ruled not to be evidence. The designation of his residence in a solemn instrument, such as a deed or a will, is in the nature of a fact rather than a declaration, being made when there was no controversy, and when no possible interest could exist to give a false designation. 478

But this evidence, which is merely presumptive, being admitted, it was proper to let the other party into proof of facts and circumstances, which would have a tendency to rebut the presumption arising from it. And we consider the facts offered to be proved by the defendants, to be of this character.

The original settlement of the grandfather being in Sutton, his temporary residence in Oxford was not inconsistent with it ; for he might have been in the place at both the periods mentioned in the deed and will, and yet never have gained a settlement there. He might have been warned out, or not have remained there a year at any one time.

Then the fact offered to be proved, that the father, many years afterwards, was maintained as a pauper by the town of Sutton, might furnish presumptive evidence, that the grandfather's settlement in Sutton continued and was transmitted to the father, or that the latter had gained a settlement there in his own right.

This would not be sufficient, independently, to prove his settlement in Sutton, but was admissible to contradict the inference, drawn from the presumptive evidence, that the grandfather had gained a settlement in Oxford. On this ground only, we think that the verdict must be set aside, and a new trial granted.

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MOSES HUMES *et ux. versus* MARK WOOD, Executor

A testator gave a specific and several general legacies, and devised his farm, being all his real estate, to several of his children, and afterwards by a general clause made the same children residuary legatees and devisees; his personal property was not sufficient to pay his debts and the specific legacy. *Held*, that the general legatees must lose their legacies, and that the real estate, being specifically devised, could not be sold to pay them.

THIS was an action of debt to recover a legacy of 40 dollars given to the plaintiff, Miranda Humes, by the will of her father, Thaddeus Thayer, of which the defendant is executor.

The case was submitted to the Court upon an agreed statement of facts.

The whole personal estate of the testator, exclusive of certain articles specifically bequeathed, was not sufficient to pay his debts; and a balance of more than 200 dollars was due to
479 the executor upon the settlement of his account, a part of the balance being for debts paid, and a part for the charges of administration. The real estate of the testator was valued at 5100 dollars, and in his will was devised as follows. "*Item third.* I give and devise my homestead, or the farm whereon I now live, the same being all the real estate which I am now seised and possessed of, consisting," &c. to his four sons, Silvanus, Chapin, Albert, and Joseph, and his four daughters Elzada, Almira, Milley, and Zilpha. After giving one specific and several general legacies, and among others that to the plaintiff, Miranda Humes, the residuary clause follows: — "I also give, bequeath, and devise, in common and undivided and in equal proportions, all my estate, real and personal, not herein before bequeathed and devised," to the four sons and four daughters named above.

Oct. 3d. *B. Adams*, for the plaintiffs, contended that the executor was bound to sell the real estate to pay the legacies. It was no doubt the intention of the testator that the legatees should have a portion of his estate. The devisees of the real estate can only claim as residuary devisees, and not under the specific devise, for the last provision in the will is to prevail over the previous one. He cited *Dawes* v. *Swan*, 4 Mass. R. 208; *Parsons* v. *Winslow*, 6 Mass. R. 169; *St.* 1783, *c.* 24, § 17,

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18. The assets should be marshalled, so as to have the debts paid out of the real estate, leaving the personal estate free to pay the legacies. Toller, 423.

Merrick, contrà, cited Toller, 301, 302, 339; Bac. Abr. *Legacies &c. G, H; Hern* v. *Merick*, 2 Salk. 416; *Kightley* v. *Kightley*, 2 Ves. jun. 328; *Keeling* v. *Brown*, 5 Ves. 359; *Lupton* v. *Lupton*, 2 Johns. Ch. R. 614.

PARKER C. J. delivered the opinion of the Court. The *Oct. 6th* action cannot be maintained against the executor, because he has no funds out of which to pay the legacy. The personal estate is all consumed by debts and expenses of administration, except the stock, farming utensils, &c. which are specifically devised. The real estate is not charged with the payment of legacies, and besides is also specifically devised. It does not come into the hands of the executor, and he has no authority to sell it. That a devise of a farm or any definite parcel of real estate may be specific, the authorities cited sufficiently 480 show.

It was supposed by the counsel for the plaintiffs, that there being a general residuary devise to those to whom the real estate is given in a preceding clause, this operates as a revocation of the particular devise. But it cannot so operate contrary to the clear intention of the testator, which was, in this residuary clause, to give what might by possibility not have been before disposed of.

Plaintiffs nonsuit.

STILLMAN FITCH *et al. versus* BUSH FITCH.

A covenant by an heir expectant, that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor.

THIS was an action of covenant broken, brought upon a deed made by the defendant on the 3d of May, 1825.

In this deed the defendant says, "I, Bush Fitch, in consideration of 1400 dollars paid me by Stillman Fitch and George Fitch, (the plaintiffs,) my brothers, as well as for the

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Fitch v. Fitch.

purpose of enabling my father, Ebenezer Fitch, to settle his estate as far as may be, during his lifetime, among his children and heirs at law, do by these presents, for myself, my heirs, executors, &c. transfer, assign, sell and forever release and quitclaim unto the said Stillman and George, their heirs, &c. all the right, title, interest, claim and demand which I now have or can have hereafter, either by will or descent or otherwise, in or to the estate of my father, either real or personal. To have and to hold to the said Stillman and George, their heirs, &c. to them and their use forever. And I do for myself, &c. covenant with the said Stillman and George, their heirs, &c. that I will not at any time claim, demand or receive any share or portion or part out of my father's estate, and that I will, &c. on demand of the said Stillman and George, &c.
481 and at their expense, execute and deliver to them, &c. all such deeds, power of attorney or other such proper instrument as may be necessary and adapted to enable them to receive the full benefit of this deed according to the true intent and meaning thereof."

The declaration sets forth the substance of the deed, and avers that Ebenezer Fitch died in January, 1826, leaving a will and codicils, which were duly proved in May, 1826. by which the testator, after making divers devises and bequests, gave the residue of his estate, real and personal, to his sons, Ebenezer, William, Bush and Achley, and to their heirs, to be equally divided between them; that this residue included certain tracts of land specified in the declaration, of the value of 4000 dollars; that it was necessary, to enable the plaintiffs to receive the full benefit of the deed, that the defendant should execute and deliver to them a deed of all his interest, right and title in and unto these tracts of land; and that on March 6, 1827, they demanded of the defendant, that he should execute and deliver to them, and at their expense, a deed of all his interest, right and title in the tracts of land above mentioned, but that he had refused.

The defendant, after oyer of the deed, pleads that no such demand was made before the action was commenced; and issue was taken upon that fact.

At the trial, before *Parker* C. J., at April term 1828, the

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plaintiffs offered certain depositions in evidence, to prove a demand; whereupon the defendant consented to be defaulted, with liberty to move that the default be taken off and that the plaintiffs be nonsuited, in case there was not sufficient evidence in the depositions, of an actual demand, or of a waiver of a demand; otherwise the default was to stand and a hearing in chancery to be had; unless the Court should be of opinion that the contract and covenants on which the action was brought, were sufficient to entitle the plaintiffs to recover.

The case came before the Court at September term 1828, when it was intimated by the plaintiffs, that the contract was made with the consent of Ebenezer Fitch, the father of the parties; though this fact was not alleged in the declaration. The Court said, that as one objection against contracts of this kind is, that they are productive of imposition upon the ancestor, the fact stated might be material. Whereupon the plaintiffs, upon leave obtained, amended their declaration by adding an averment, that the deed was made, executed and delivered with the knowledge and by the consent of Ebenezer Fitch; and to the declaration so amended the defendant demurred generally. 432

Merrick, in support of the demurrer. No title passed by the deed, the defendant having no estate in the land. A grant of a mere possibility is void. *Davis* v. *Hayden*, 9 Mass. R. 514; Bac. Abr. *Grant*, *D* 3; Com. Dig. *Grant*, *D*, and *Assignment*, *C* 3; Shep. Touch. 239; *Jones* v. *Roe*, 3 T. R. 93; 2 Mad. Ch. Pr. 549, cites *Carleton* v. *Leighton*, 3 Meriv. 667. A title will enure by estoppel, only where public policy or some positive law does not interfere. *Somes* v. *Skinner*, 3 Pick. 52; *Brinley* v. *Whiting*, 5 Pick. 348. Here public policy does interfere and avoid the deed. The only difference between this case and that of *Boynton* v. *Hubbard*, 7 Mass. R. 112, is, that here the father knew of the contract, so that no fraud was practised upon him; but still the deed is against public policy. Immediately after this bargain was made, the father might have cut the defendant off with a shilling; so that a way was opened for the commission of fraud. There was no rule for estimating the value of the property which the father might leave to the defendant; it was Sept 29th

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wholly uncertain whether he would die testate or intestate, or whether he might not lose his property before his death; the contract, therefore, was a desperate wager, which the Court will not enforce. *Amory* v. *Gilman*, 2 Mass. R. 1. It is believed that no decision of any common law court can be found, in favor of such a contract as the present; and in the two cases in chancery, of *Beckley* v. *Newland*, 2 P. Wms. 182, and *Hobson* v. *Trevor*, ibid. 192, the reasons are not satisfactory. Heirs are relieved in chancery against such contracts. 1 Madd. Ch. Pr. (Hartford edit.) 117.

If the contract is not void, then because it is valid this action cannot be sustained, for according to *Somes* v. *Skinner*, 3 Pick. 52, the title is already vested in the plaintiffs.

483 *Newton, contrà*, contended that the deed was not against public policy; and he referred to 1 Madd. Ch. Pr. (Hartford edit.) 408, 409; *Musprat* v. *Gordon*, 1 Anstr. 34; *Hobson* v. *Trevor* and *Beckley* v. *Newland*, before cited; *Lloyd* v. *Johnes*, 9 Ves. 52.

March term 1830, in Suffolk.

PARKER C. J. drew up the opinion of the Court. As the declaration now stands, as amended, we do not think it bad on demurrer. Though no title passed by the deed made in the lifetime of the father, there being nothing then to grant,[1] yet the covenant to make further assurances may be valid, if made on good consideration, without any oppression or advantage taken of the heir expectant, and with the knowledge and consent of the father. In such case, there is no fraud upon him, no imposition upon the heir who covenants, and no injury to the public; which are the grounds on which such contracts are set aside in chancery.

Here a full and adequate consideration was paid to the defendant, who was desirous of receiving the value of that portion of his father's estate, which in the course of law would fall to him. With this, he goes abroad to enter upon business, with a money capital. The father, acquiescing in his wishes, assents to the purchase made by two other sons, thinking this the best mode of providing for the immediate wants of the son who is to leave the paternal roof and seek his fortune else-

[1] See *Somes* v. *Skinner*, 3 Pick. (2d ed.) 598, note.

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where. There seems to be nothing against good policy in this; and it is not opposed by any case that has been cited. On the contrary, it is clearly within the principles of the case of *Boynton* v. *Hubbard*, 7 Mass. R. 112; in which this subject was fully and ably considered. We deem the allegation of the knowledge of the father, and his consent to the transaction, essential to the validity of the declaration.

Our judgment is, that the declaration, as amended, is good, and that the defendant may be heard in chancery as to the damages, unless he wishes to contest the consent of the father, or would allege fraud or imposition in obtaining the contract; in which case he may replead.[2]

ERASTUS HIGBEE *et al.* Appellants, *versus* ENOCH BACON, Administrator. 484

If an administrator, in his answer to interrogatories proposed to him in the Court of Probate touching his account, makes an admission tending to charge himself with any estate omitted in his account, and at the same time states a fact in his discharge, such statement must be rejected as irrelevant, unless supported by proof.

The party at whose instance interrogatories have been proposed, in the Court of Probate, to an administrator touching his account, has a right to offer evidence to disprove his answers.

ENOCH BACON having rendered in the Probate Court his second account as administrator of the estate of his father, Ephraim Bacon, the appellants, heirs at law of Ephraim, filed a complaint, stating that they suspect the administrator has concealed and embezzled moneys, goods and chattels belonging to the estate of the intestate, and especially that he conceals and refuses to account for a certain instrument whereby he was bound to pay to the intestate certain large sums of money, and upon which, at the time of the intestate's decease, large arrearages were due and unpaid, and still remain unpaid and unaccounted for; and the appellants pray that the administrator may be cited to produce the instrument and submit himself to

[2] See 1 Story's Comm. on Equity, 334 *et seq*, and cases cited in notes.

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Higbee v. Bacon.

an examination upon oath, touching the matters contained in the complaint.

The administrator having appeared to make answer to the complaint, the following interrogatories were proposed to him:—

Did your father, at any time during his life, hold a bond, lease or other instrument or obligation whereby you promised or undertook to pay him any sum or sums of money?

Were any of said instruments under seal; if so, how many, and what were they; and if any such sealed instruments were held by your father during his life, did you take them into your possession after his decease?

The administrator produced an indenture of lease, dated April 1, 1806, by which, for the consideration of 1560 dollars, he demises the farm, on which he then lived, to his father for life, and agrees to carry on the farm at his own expense, and to pay his father 50 dollars yearly during his father's life, and to
485 pay the taxes. In answer to the complaint and to the interrogatories, the administrator stated, that previous to April 1, 1806, he had labored for his father for about sixteen years, for most of which time he claimed compensation; that on that day he received from his father a deed, dated June 23, 1792, given by J. Bates to him (the respondent), and which he understood was procured by his father's giving up a deed formerly given to him (the father) by Bates, bearing the same date; that he believed, and he has no doubt his father believed, that the amount due to the respondent and the sum which the respondent then secured and afterwards paid to his father, were a full equivalent to the interest which his father had in the farm; that at the time of receiving the deed, the respondent delivered to his father the instrument above set forth; that no consideration ever passed to him from his father, for the giving of this instrument, nor did the respondent ever expect to pay the sums therein mentioned; that the instrument remained in his father's hands until his decease in August, 1825, (when it came into the respondent's hands,) without any demand or request on the respondent for the payment of any thing thereon; but on the contrary, his father repeatedly told him, that he (the father) never should claim of the respondent any payment on the in-

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strument, and that the services which the respondent had rendered him and was from time to time rendering him, were a full equivalent to all the sums which he might or could demand by virtue of the instrument, and that he considered the instrument to be fully settled and paid by these services; that the respondent fully believed that the services which he rendered to his father, from the date of the instrument to the time of his decease, were of more value to him and more injurious to the respondent, than the payment of the 50 dollars would have been. He further stated, that the instrument was handed to him by S. Fiske, one of the executors named in the will of Ephraim Bacon, (which was not proved and allowed,) and that it came into his possession with other papers of the deceased.

The complainants, reserving all manner of advantage of exception to the insufficiencies and impertinence of the answer, for replication say, that they will aver and prove their bill and complaint to be true, certain and sufficient in law to be answered to, and that the answer is uncertain, untrue and insuffi- 486
cient to be replied to, without that, that any other matter or thing whatsoever in the answer contained, material or effectual in the law to be replied unto, or to be confessed and avoided, traversed or denied, is true.

The Court of Probate allowed the administrator's account, and adjudged that he should be discharged and not held for any thing which might be supposed due to the estate of the intestate on the lease above mentioned. The court further adjudged, that no collateral evidence ought to be admitted to contradict the answers of the administrator.

The complainants appealed from this decree, for several reasons.

1. Because the judge of probate refused to strike out from the answer of the administrator certain matters not relevant to any interrogatory put by the complainants, but altogether irrelevant, impertinent and improper.

2. Because the administrator was not required to prove the truth of certain allegations by him made in his answer, whereby he attempts to discharge himself from the payment of the obligation purporting a lease, although these allegations were denied by the complainants to be true.

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3. Because the complainants were not permitted to produce any evidence to contradict or explain divers allegations contained in the answer, though they offered so to do.

4. Because the judge decided that the answer was sufficient in law and conclusive to discharge the respondent from any liability as administrator, upon the obligation above mentioned.

5. Because the judge refused to admit evidence to charge the administrator for goods, effects, credits or assets not credited in his second administration account, which was open and pending before the judge.

Oct. 5th. *J. Davis* and *Tufts*, for the appellants. Two points are decided by the judge of probate; first, that the answer of the administrator discharged him from liability upon the instrument produced; and secondly, that no evidence was admissible to impeach his answer. In both respects the decree is erroneous.

The complaint had a two-fold object; — that the administrator should produce the lease, and that he should answer as to
487 other property. In respect to the lease, the complaint is like a bill in chancery to produce papers. Com. Dig. *Chancery*, 3 *B* 1, 3 *I* 1. The administrator was called on simply to produce the lease; which it was incumbent on him to do, in order that the appellants might be in as good a situation as before he was appointed administrator. He produces the lease and swears that he has complied with its terms. We contend that he is not to use his own statement in discharge of himself, and that it ought to be struck out of his answer, as irrelevant and improper.

But if the answer is to stand, it is not sufficient to discharge the administrator. Where a defendant, in his answer, admits his liability and sets forth also some fact to discharge himself, he is bound by his admission, but he must prove the fact alleged in his discharge. Blake's Ch. Pract. 247; *Hart* v. *Ten Eyck*, 2 Johns. Ch. Rep. 87.

The judge of probate erred likewise, in determining that the appellants should not offer evidence to disprove the statements in the answer. It has always been the usage to litigate an administrator's account, although he shall have sworn to its correctness. His oath is not conclusive. Toller, (3d ed.) 492, cites 4 Burn's Eccles. Law, 427; *Selectmen of Boston*

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v. *Boylston*, 4 Mass. R. 318. On a bill of discovery in chancery, the plaintiff may offer evidence to disprove the answer. Whether this complaint is considered like a bill of discovery, or as auxiliary to the proceedings in the probate court, it may be contradicted.

The object of the appellee is to drive the appellants to their remedy upon the probate bond, hoping that in such case they will be obliged to use the whole of his answer; but though the appellants would probably find no great difficulty in maintaining a suit on the bond, yet it is apprehended that substantial justice may be done by requiring the administrator to prove in the Court of Probate, that he has paid all sums due upon the instrument in question.

Newton, for the appellee. To what extent and in what manner the judge of probate shall proceed in interrogating an administrator in regard to the settlement of his accounts, has not been determined; whether he is invested with only the 488 power of spiritual courts; or whether he is to proceed like a court of equity on a bill against an executor to account, or like a court of equity upon a bill of discovery; or whether he has power to proceed in all these three ways. In the spiritual courts, if the administrator is examined on oath touching the inventory, no evidence is admissible to contradict his answer. Toller, 253. There is no good reason for supposing that the legislature intended to give the judge of probate all the powers of a court of equity, in relation to the examination of an administrator; and in a court of equity, if the complainant makes the administrator his witness, the whole answer must be taken together. This complaint cannot be likened to a bill of discovery, for that is used only in aid of another suit; but here the object seems to be to charge the administrator. 1 Madd. Ch. Pr. 196. To effect the object of the complainants, the Court of Probate must unite in itself the powers of spiritual courts and courts of chancery, in the three modes of proceeding before mentioned. But it is apprehended that only the powers of spiritual courts were intended to be conferred on the judge of probate.

This complaint must be founded upon *St.* 1783, *c.* 32, § 11; but this statute does not provide for the examination of an

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executor or administrator, but only of other persons who are supposed to have concealed or embezzled effects of the deceased. *Selectmen of Boston* v. *Boylston*, 4 Mass. R. 318. If the heirs can file such a complaint against the administrator, it must be in the nature of a bill of discovery, and then his answer cannot be contradicted.

The answer contains nothing irrelevant or impertinent. If the administrator had simply produced the paper, he would have made himself liable upon it; it was therefore proper for him to state all the circumstances, whereby it would appear that he was not chargeable.

March 26th, 1830, *in Suffolk.*

PARKER C. J. drew up the opinion of the Court. We think the proceedings of the judge of probate in this case were incorrect, and that his decree allowing the second account of administration must be reversed. It was heretofore determined, that the administrator was obliged to answer under oath touching any matters relating to his account and tending to charge him with any estate or effects which he may have

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omitted either by mistake or design. Without this power he may defraud the heirs or creditors without any opportunity to detect him. As in the present case; there was an obligation from him to his father, found uncancelled among the papers of the deceased, which came to his hands as administrator. He might have burnt or otherwise have destroyed it, and there might be no proof that it was ever in existence. Merely swearing to his account gives little security, without the authority in the judge of probate, at the instance of those interested in the estate, to examine him critically under the sanction of his oath. It was objected on a former hearing, that it is contrary to justice and to the principles of the constitution, to subject a party to such an inquisitorial power, and by means of it to make him furnish evidence against himself. But the same objection will lie to the trustee process and to bills in equity, which require answers under oath. It should be recollected that an administrator is a trustee, accepting the trust voluntarily, and so having no right to complain of the liabilities incident to the trust. Such has been the practice in the Probate Courts, and it has been sanctioned by this Court in the case of *Selectmen of Boston* v. *Boylston*, 4 Mass. R. 318, and *Stearns* v.

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Stearns, 1 Pick. 157.[1] But it certainly does not follow, that because he may be so examined, he will have a right to discharge himself by his own statement and declaration, unaccompanied by any evidence.

The rule is, that any answer that is within the proper scope and limits of the question put to him, shall be available in his favor; as in confessions in suits at common law, the whole shall be taken together, not as conclusive, but as evidence for the consideration of the jury. But because he is put upon interrogatories, to allow him the general liberty of avoiding the effect of his admissions by going into independent matter, without any proof to support it, would be often to render this mode of inquiry wholly ineffectual for the purposes for which it was instituted. We think the judge ought to have rejected the irrelevant matter if not supported by proof, and that the appellants ought to have been allowed to contradict his statement by evidence; and because this was refused, the decree is reversed and the case remitted to the judge of probate for further proceedings.

EBENEZER W. CUTLER *versus* GILBERT W. HAVEN. 490

A note, and a mortgage deed given to secure it, were handed, with other effects, by A, the administrator of the mortgagee, to B, the guardian of the mortgagee's heirs, on a settlement, as their property, but the note was not indorsed, and no assignment in writing was made of the mortgage, but a power of attorney was given to B to act in the name of A. This power was not recorded. It was *held*, that the mortgager or his assigns, if acquainted with the equitable assignment, had no right to tender or pay the mortgage money to A, if such tender or payment was made with a design to injure B and the heirs; and that a discharge of the mortgage made by A would not defeat the rights of B.

It seems, that the payment should be made to B, and that he might discharge the mortgage by cancelling the deed and giving up the note.

The expression "power of attorney" implies a power under seal.

THIS case was assumpsit for use and occupation, and was tried before *Cummins* J. of the C. C. P. on the general issue.

The plaintiff gave in evidence a mortgage deed of the land from G. Brown, and proved that on May 9, 1825, he entered

[1] See Revised Stat. *c.* 67, § 7

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for condition broken, and that after the discharge of a prior mortgage on the same estate, which discharge was made by Samuel Haven, administrator, as hereinafter mentioned, notice was given to the defendant to pay the rent to the plaintiff.

The defendant proved that he occupied the estate under a lease for years from Joseph Valentine. He also proved that Brown, prior to the mortgage to the plaintiff, mortgaged the estate to Samuel Haven junior, and that Brown's equity of redemption was sold on execution, and was purchased by and duly conveyed to Haven junior.

The defendant also offered evidence to show, that Haven junior having died, administration on his estate was granted to Samuel Haven and V. Hemmenway: That in 1818 they settled their final account in the probate office, and paid over the effects in their hands to Valentine, who was guardian of all the heirs of Haven junior, except one who was under the guardianship of Samuel Haven: That the administrators, in making payment to Valentine, passed into his hands divers promissory notes due to the intestate's estate, and among them the note of Brown secured by the mortgage, and also the mortgage deed. But it appeared that the notes were not indorsed, and the mortgage was not assigned by any written instrument. The administrators, however, at the time, gave Valentine a power
491 of attorney to act in their names, in order to enable him to realize the full benefit of the effects put into his hands.

A few months after the plaintiff had taken possession of the land, Valentine entered on and took possession of it by virtue of his power of attorney, for breach of the condition of the mortgage to Haven junior. And Valentine subsequently made the lease of the land to the defendant, by virtue of a power of attorney from all the heirs of Haven junior, they having become of full age.

The plaintiff proved a tender to Samuel Haven, as surviving administrator (Hemmenway having deceased), of all the money due on the mortgage to Haven junior, and a discharge of the mortgage in the registry of deeds, dated January 19, 1827, by Samuel Haven, as surviving administrator.

This discharge was attempted to be impeached on the ground that it was fraudulently obtained by the plaintiff, with intent to

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injure Valentine. And the defendant offered evidence to show that the plaintiff was well acquainted with Valentine's claims and rights, and that he paid Samuel Haven a less sum than was due on the mortgage; but the plaintiff offered evidence which tended to prove that the amount deducted from the sum due on the mortgage was on account of a claim which the plaintiff made against one of the heirs of Haven junior, and which was allowed by the administrator.

The judge instructed the jury, that the acts done by the administrators were insufficient to pass or transfer to Valentine any legal interest in Brown's mortgage to their intestate; and that the legal estate remained in the administrators, and the survivor of them; and that on January 19, 1827, Samuel Haven, the surviving administrator, was the only person who had power to discharge the mortgage, and the tender or payment of the money due thereon was rightly made to him, and that he had a right to receive the money and discharge the mortgage, and that if the plaintiff had acted otherwise, he could not have protected his own interest in the mortgaged premises.

The judge also instructed the jury, that as the legal estate in the mortgaged property was in Samuel Haven, as surviving administrator, if the discharge made by him was obtained by the plaintiff fairly and without fraud done or intended towards Samuel Haven, it was valid in law, notwithstanding the plaintiff 492
might have intended thereby to defeat Valentine's equitable interest in the mortgaged property, and although Valentine had thereby been defrauded of his interest in it, and notwithstanding the plaintiff, having a full knowledge of the transactions between Valentine and the administrators, and of Valentine's claims, procured the discharge of the mortgage by paying Haven a less sum than the plaintiff knew was due on it.

To these opinions of the Court, the counsel for the defendant excepted.

Merrick, in support of the exceptions. The note having Oct. 5th
been assigned by the administrators of the promisee, could not be defeated by them. *Jones* v. *Witter*, 13 Mass. R. 304; *Dunn* v. *Snell*, 15 Mass. R. 581. Valentine, then, having an absolute right in the note, was vested by his power of attorney with a right to enter on the mortgaged land; and this power,

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being coupled with an interest, was irrevocable. Com. Dig. *Poiar*, *A*; *Osgood* v. *Franklin*, 2 Johns. Ch. R. 1. The tender should have been made to Valentine, and if Haven, the surviving administrator, on being notified, had refused to release, it would have been a good cause for a bill in equity. The administrator, by his fraudulent release, could not cut off his assignee from his rights. *Brown* v. *Maine Bank*, 11 Mass. R. 153.

Newton and *Lincoln*, *contrà*. The transactions between Valentine and the administrators did not transfer the legal estate in the mortgaged land to him; it still remained in the administrators. *Parsons* v. *Welles*, 17 Mass. R. 425; *Warden* v. *Adams*, 15 Mass. R. 233; *Scott* v. *M'Farland*, 13 Mass. R. 309. The power of attorney given to Valentine cannot affect the case, as it was not produced at the trial, and it does not appear that it was under seal. Besides, the power, not being recorded, could not operate as a notice to the plaintiff of Valentine's claim. *Taylor* v. *M'Donald*, 2 Bibb, 420; *Dunham* v. *Dey*, 15 Johns. R. 555; *Johnson* v. *Stagg*, 2 Johns. R. 510; *Chandos* v. *Brownlow*, 2 Ridgway, 422, cited in Pow. on Mort. 631; *Phillips* v. *Redhill*, cited in *Hitchcox* v. *Sedgwick*, 2 Vern. 160. The tender was properly made to the administrator, notwithstanding the equitable interest of the heirs whom Valentine represented. *Scott* v. *M'Farland*, 13 Mass.
493 R. 309; *St.* 1788, *c.* 51; 1 Pow. 214. Haven, the administrator, was the only person of record who could discharge the mortgage; it would be unreasonable to hold the plaintiff bound to find out who were equitably interested. The plaintiff was bound to pay Haven, in order to protect himself. Whatever the transactions between the plaintiff and Haven were, the heirs are not injured, for they have a remedy on the administration bond. Even if the plaintiff knew of Valentine's equitable claim, he was not bound to look after the appropriation of the money by the administrator. 1 Pow. on Mort. by Rand, 219. The burden of proof is on the defendant. 2 Pow. on Mort. 631.

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Parker C. J. afterward drew up the opinion of the Court. A new trial is granted in this case, on account of a misdirection of the judge in his charge to the jury. Notwithstanding there was no legal assignment of the mortgage deed by the admnis-

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trators of Haven junior to Valentine as guardian to the children of Haven junior, there was, by the delivery of the deed and the note collateral to it, with a power of attorney to enable him to enforce the payment of the debt, an equitable interest in Valentine, which could not be defeated by any fraudulent transaction between the plaintiff and the surviving administrator. That the payment to that administrator, and his discharge of the mortgage on the record, were fraudulent against Valentine and his wards, cannot admit of a doubt, if Cutler knew of the possession of the deed and note by Valentine, and the purposes for which they were placed in his hands; and it was this knowledge which was proposed to be proved by the defendant; but permission to do it was refused by the judge, on the ground, that if Haven, the administrator, was not defrauded, the transaction was legal. But Valentine, the guardian, was the only person who could be defrauded. The money belonged to him in trust for his wards, and the payment, if made to the administrator, should not have been made without notice to Valentine and his consent thereto. It is said that Valentine could not have received the money, and could not have discharged the mortgage. But we think that, holding the mortgage deed and the power of attorney, he might have received the debt and delivered up the note and cancelled the mortgage.[1]

It is suggested that the power of attorney might not have been by deed, and was not recorded. But the very terms *power of attorney* import a deed,[1] unless the contrary is shown, 494 and the knowledge of the plaintiff superseded the necessity of a registry.

Supposing the facts stated and offered to be proved, to be true, there was unquestionably collusion between the plaintiff and Haven, the administrator, which prevents any legal effect of the transaction, to the prejudice of the heirs of Haven junior. If the payment and discharge are held valid, then a most gross fraud is practised, and if the heirs should seek their remedy against the administrator and his sureties, upon the bond, the sureties would suffer by that fraud. It is more conformable

[1] See 1 United States Dig. *tit. Assignment, ch.* III. & IV.; *Southerin* v. *Mendum*, 5 N. Hamp. R. 430.

[1] See Story's Comm. on Agency, 3.

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therefore to justice, that the payment should be held void as against Valentine, and the mortgage still in force; and then, if the money paid to the administrator is lost, the loss will fall upon him who ought to bear it. The defendant therefore would continue the lessee of Valentine, the entry upon him would be void, and so the action for rent would not be maintained.

A new trial is therefore granted.

David Baldwin *versus* The Inhabitants of the First Parish in Fitchburg.

The personal property of a minor who attends public worship in a different parish from his guardian, is nevertheless to be taxed to the guardian in the parish of which he is a member.

Assumpsit for money had and received.

The parties agreed upon the following facts. In 1828, the First Parish in Fitchburg voted to raise the sum of 600 dollars as a parish tax. The sum of 5 dollars 28 cents was assessed upon the plaintiff for certain personal property which he held as guardian of Abel and George Farwell, minor children of Daniel Farwell deceased, and was collected by a distress of his own property, and received into the parish treasury. At this time, and long before, the plaintiff was a regular member of the Second Parish in Fitchburg. At the time of the decease of Daniel Farwell there was but one religious society in Fitchburg, to which he then belonged, except a Baptist society, which was incorporated in 1810 and has been in existence to this time.

495 In 1820, when the plaintiff was appointed guardian, he was a member of the same religious society to which Daniel Farwell belonged at the time of his decease, and which was of different religious sentiments from the First Parish, the defendants. In 1823 the Second Parish was formed; of which the plaintiff became a member in 1824. One of the minors, from the time of his father's death to the time of the assessment of the tax, was a member of his mother's family. She had married a second husband, a member of the First Parish, and with this fam-

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ily the minor regularly attended public worship in the First Parish, he being continued in this family, under the agreement of the plaintiff, at a stipulated price. Neither of the minors has ever resided in the family of the plaintiff, but they have been under his direction and control.

Strong, Justice of the Court of Common Pleas, was of opinion that the First Parish had a legal right to tax the plaintiff as guardian, and he ordered judgment to be entered for the defendants; to which opinion and order the plaintiff filed exceptions.

J. Davis supported the exceptions. The defendants admit that the guardian is the person to be taxed; *Payson* v. *Tufts*, 13 Mass. R. 493; and the plaintiff contends that the property follows the guardian. The liability to be taxed depends on membership; and *that* the guardian is to determine. He is *in loco parentis*; he is trustee both of the person and of the estate of his ward. Reeve's Dom. Rel. 327; Bingham on Infancy, 168. The *St.* 1823, *c.* 106, in authorizing persons to separate themselves from one religious society and become members of another, did not intend to include minors; who are incapable of making a contract. Neither does this case come within the provision, that any person who may come to dwell in any town, shall be taken to be a member of the oldest religious society in the town, unless he shall file a certificate that he has joined some other religious society. When a man dies, his membership ceases, and his children, if of age, choose for themselves their place of worship, and if under age, their guardian determines to what society he will pay their taxes. *Oct. 5th.*

Merrick, for the defendants. By *St.* 1786, *c.* 10, § 3, a parish is authorized to grant money for parochial purposes, to be assessed on the polls and property within the parish. In the lifetime of the father, these minors belonged with him to the First Parish in Fitchburg; and as the guardian has filed no certificate pursuant to the statute of 1823, their relation to that parish remains unchanged. 496

The opinion of the Court was afterwards drawn up by

PARKER C. J. The general question is, whether the personal property of minors, who are under guardianship, is liable to taxation in the parish of which their father was a member *March 26th, 1830, in Suffolk*

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Baldwin v. First Par. in Fitchburg.

when he died and within the bounds of which they continue to reside with their mother, or in another parish, in the same town, of which the guardian is an inhabitant and member And we are clearly of opinion that such property is to be taxed to the guardian by the parish within which he dwells and of which is a member. That it is to be taxed to the guardian and not to the minor, or at least that it may be properly taxed to the guardian, is settled in the case of *Payson* v. *Tufts*, 13 Mass. R. 492. And that the parish to which the guardian belongs has a right to the tax, follows from the provisions of *St* 1786, *c.* 10, § 3.

The personal property of minors must be presumed to be in the actual custody or under the control of the guardian, and is therefore in the parish where he dwells. We do not find that any subsequent statute has expressly or by implication repealed this, those which provide for a removal from one parish or religious society to another having no bearing on the question. The minors cannot be members of any parish, in the sense of the law, in regard to taxation, having no voice in parish affairs, and though they may attend public worship in a different parish from their guardian, still their personal property is not there, nor are they to be taxed on account of it.[1]

Judgment of Court of Common Pleas reversed.

[1] See Revised Stat. *c.* 7, § 6, 10.

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AARON BROOKS Junior *versus* PETER HARWOOD *et al.*

Two parcels of land, in which S is entitled to dower, are mortgaged together as security for a debt. Afterward the mortgager conveys all his interest in one parcel to A. H. and in consideration of S's joining in the conveyance and releasing her right of dower, he conveys to her an estate for her life in the other parcel, upon which parcel she enters and takes the profits. The plaintiff purchases the mortgager's right to redeem this second parcel. P. H. having purchased A. H.'s interest in the first parcel, takes an assignment of the mortgage, and enters upon the mortgaged premises for foreclosure. On a bill in equity by the plaintiff to redeem, it was *held*, that S was not liable to contribute towards the redemption, nor to account for the profits of the second parcel, the lease for life having been made to her as an equivalent to her right of dower in both parcels.

Held, also, that as the assignee of the mortgage could not have compelled S to pay over the rents and profits of the second parcel, without subjecting himself to her claim of dower in the whole land, he was not bound to account for them in this suit; and that the plaintiff had no equitable claim to them, as he purchased after the lease for life, and consequently at a reduced price on that account.

Held, also, that the assignee of the mortgage was bound to account for the rents and profits of the first parcel, from the time of his entry for foreclosure.

Held, also, that the plaintiff, upon paying the whole mortgage debt, deducting the rents and profits last mentioned, would be entitled to hold the whole estate mortgaged, excepting the part leased to S during her life, until he should be reimbursed the amount paid by him over his proportion of the mortgage debt.

THIS was a bill in equity to redeem certain mortgaged estate. The prayer of the bill extended to the redemption of a farm in Phillipston and other estate included in the same mortgage, but the object of the plaintiff was to redeem only the estate last mentioned.

The case was submitted on the following statement of facts.

The farm, together with the estate of which redemption is claimed, was mortgaged by Nathan Stratton to Hutchins Hapgood, February 9, 1820, to secure the payment of 1200 dollars. In these mortgaged estates, Sarah Stratton, one of the defendants, was entitled to dower.

On November 5, 1820, Nathan Stratton conveyed the farm, subject to the mortgage, to Abner Harwood, and Sarah Stratton also released her interest to Abner Harwood; and Nathan Stratton, at the same time, in consideration of this release by her, leased the other mortgaged estate to her for life; which she entered upon and has continued to occupy ever since.

On May 20, 1822, Nathan Stratton's right of redeeming the 498

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to Sudbury, where he commenced keeping another public house, and where he purchased additional furniture. There was no delivery of the furniture at the time of the sale; which was made at the distance of about two miles from the house in Shrewsbury; nor was there any contract by which Jacob S. was to have the use of the furniture.

To prove a delivery of the furniture, the plaintiffs called two witnesses, F. Nichols and Lucy Newton.

Nichols testified, that the property was given up to the plaintiffs at the house which was leased to them; that Rufus Shumway came there and said that he had paid for the property; that this took place within a month after the attachment made by Eager. On cross-examination, Nichols said that the property was not moved after Eager's attachment was given up; that no person was present at the time of the above conversation, which took place in the bar-room, except Rufus and the witness; that nothing more was done or said upon the subject of giving up the property, to the knowledge of the witness, and that Jacob continued to use the furniture exactly as if nothing had occurred.

Lucy Newton testified that she lived at the house of Jacob, when Eager attached the property. Rufus came there in April, and stayed until October, and used part of the property which was attached, just when he wished. It remained in the house as it had done, until Jacob removed to Sudbury On cross-examination, she said that Rufus lived at the house of Jacob, in the room called No. 2, and had his wife and two children there; that there were some articles of furniture in that room, which he used; that he brought very little furniture with him, but he brought a bed; and it appeared from her testimony, that the property now in question was used indiscriminately, as well by Jacob as by Rufus, during the time that Rufus lived at the house. She testified that she never perceived any difference in the ownership or possession of the property, between the state of things before Rufus came there, and while he remained there, and after he went away; that from the time of the attachment by Eager until Jacob's removal to Sudbury, Jacob kept the tavern himself, and used and treated the property in all respects as his own.

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There was no evidence of any symbolical delivery, or of any actual delivery of the whole or any part, unless it is to be inferred from the facts above stated.

The jury found that the plaintiffs went to the house, after they had the lease, and with the intent to take possession, and that they took possession of the furniture by the permission of Jacob, under the bill of sale. But the defendant objected, that the evidence would not warrant the finding of the jury.

At the time when the defendant attached the furniture at Sudbury, Jacob represented the whole property attached, as belonging to himself. A great variety of furniture other than that afterwards claimed by the plaintiffs, and of the same description as a part of the property claimed by them, was, at the time of the attachment, in the possession of Jacob, and all of it was indiscriminately mingled together, and was all attached at the same time. Afterwards, when the plaintiffs claimed the property sued for, the defendant desired Rufus to designate the articles claimed by them. Rufus replied, according to the testimony of one witness, that he could not select all the articles; according to the testimony of others, he replied that he could not distinguish his property. The bill of sale was however shown to the defendant, and he desired Rufus to designate the articles belonging to the plaintiffs, but Rufus could not distinguish them from the other furniture in Jacob's possession. Jacob was also requested to point out the property which belonged to the plaintiffs, but he said that he could not identify it. The defendant contended, that the plaintiffs could not maintain this action, by reason that their property, if they had any, was thus intermingled with the property of the debtor.

The jury found a verdict for the plaintiffs; and they settled the question of fraud in their favor.

If there was sufficient evidence of a delivery, and if the plaintiffs could maintain the action, notwithstanding they could not designate their property, the verdict was to stand; otherwise the plaintiffs were to become nonsuit.

Merrick, for the defendant, insisted that there was not sufficient evidence of possession being taken by the plaintiffs. *Lanfear* v. *Sumner*, 17 Mass. R. 110; *Lamb* v. *Durant*, 12 Mass. R. 54; *Smith* v. *Dennie*, 6 Pick. 262; *Bailey* v.

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Ogden, 3 Johns. R. 399; *Patten* v. *Clark*, 5 Pick. 5. *Beaumont* v. *Crane*, 14 Mass. R. 400; 3 Stark. Ev. 1190, 1191. These articles of furniture would be considered as in the possession, order and disposition of Jacob Shumway, within the meaning of the statute of 21 *Jac.* 1, *c.* 19, if that statute were in force here. *Collins* v. *Forbes*, 3 T. R. 316; *Storer* v. *Hunter*, 3 Barn. & Cressw. 368; *Tooke* v. *Hollingworth*, 5 T. R. 215; Com. Dig. *Bankrupt*, *D* 19, note *e*; *Chesterfield Manuf. Co.* v. *Dehon*, 5 Pick. 7.

Where the plaintiff's goods are so intermingled with those of the debtor, as not to be distinguishable, trover will not lie against the officer until the plaintiff points out his goods and makes a demand of them; according to the remark of *Parsons* C. J. in *Bond* v. *Ward*, 7 Mass. R. 123. The officer may demand a bond of indemnity where he has reason to doubt the ownership of the property to be attached; but where he has no cause of suspicion, he is not to require such a bond. That the goods here were so intermingled as to be incapable of being distinguished, was owing to the fault of the owners; and policy demands that the officer should be protected. *Marshall* v. *Hosmer*, 4 Mass. R. 60; *Perley* v. *Foster*, 9 Mass. R. 112.

J. Davis and *Allen*, *contrà*, cited in regard to delivery, *Bartlett* v. *Williams*, 1 Pick. 288; *Rice* v. *Austin*, 17 Mass. R. 197; *Chaplin* v. *Rogers*, 1 East, 192; *Hodgson* v. *Le Bret*, 1 Campb. 233; *Anderson* v. *Scott*, ibid. 235, note; *Codman* v. *Winslow*, 10 Mass. R. 146.

The dictum of *Parsons* C. J. in *Bond* v. *Ward*, relied on by the defendant, is not supported by adjudged cases; there must be a wilful intermingling of the goods. Here however there was notice and a demand, and by aid of the bill of sale, the officer might have separated most of the articles belonging to the plaintiffs. The doctrine of a confusion of goods applies to articles, the portions of which, from their nature, cannot be distinguished, as corn, gold cast into a crucible, &c. but not to articles of furniture. 2 Bl. Com. 405; 3 Dane's Abr. 117. The circumstance that the plaintiffs could not distinguish every article will not prevent them from maintaining trover. Buller's N. P. 35; 3 Dane's Abr. 188, 189.

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Shumway v. Rutter. Oct. 5th.

PARKER C. J. delivered the opinion of the Court. We think that the case reported furnishes competent evidence of a delivery, and sufficient to support the verdict on that point. The transfer being *bonâ fide* and for a valuable consideration, slight evidence of a delivery would be sufficient; as is proved by the principle adopted of a symbolical delivery; and whether there is a formal delivery or not, if the vendee obtains possession by consent of the vendor, before any attachment or second sale, the transfer is complete.

In this case, the vendees took a lease of the house in which the furniture was. Nothing was wanting on the former trial, but evidence of an entry under the lease, to prove a delivery or possession. On this trial that defect has been supplied; so that the sale was perfect.

But the vendor was allowed to re-possess himself of the furniture and remove it into another house in another town and county, and to use and claim it as his own, without any contract with the vendees. This circumstance necessarily created suspicion and difficulty. Persons dealing with the vendor, who in his own name occupied a public house with this furniture in it, would naturally consider him the owner, and would probably trust him on that account. If the statute of James were in force here, there is no doubt but that the furniture would be deemed the vendor's; for he had the entire order and disposition of it. But that statute is a branch of the bankrupt system, and is not applied, even in England, except in cases affected by that system. There was a similar provision in the bankrupt law of the United States.

With us, the possession and use of chattels by the vendor, after a perfect transfer, is only evidence of fraud, and may be explained to be consistent with the fairness of the sale.[1]

But the difficulty of this case now, as before, arises from the intermingling of the chattels sold to the plaintiff and those afterwards purchased and put into the house by the vendor. If the owner of a part can distinguish and point out to the officer what belongs to him, the officer would be a trespasser if he should take it. But he is obliged to attach the goods of the debtor,

[1] See Long on Sales, (Rand's edit.) 115, 116, and cases cited in note: *Wheeler v. Train*, 3 Pick. (2d edit.) 257, and note 1.

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notwithstanding they may be so mixed; and it is the business of the owner, who has allowed them to be so confused, to separate his own from the debtor's.

448 In this case, it was Jacob Shumway the debtor, who caused the mixture; but he was placed in a situation to do this by the vendees. They do not lose their property thereby, if they can prove it. They may, after an attachment, identify their goods, give notice to the officer and demand a re-delivery of them; but until they do that, the officer is not in fault, and cannot be considered a trespasser.

But the question arises, whether the plaintiffs shall lose their property altogether, because they were unable to distinguish it from other articles of the same description owned by the vendor. If there were a fraudulent collusion between the vendor and vendees to embarrass the sheriff and prevent him from attaching the property of the debtor, this consequence might follow; but on the supposition of an honest inability to distinguish, it would be harsh. There is nothing in the case to justify us in taking the ground, that their conduct was collusive.

The officer was not a trespasser in taking the goods, as he was bound to take the goods of the debtor. But could he sell them without being liable for their value? In the action of trover, proof of property and of conversion is sufficient. The proof is clear that property of the plaintiffs was taken. This taking, under the circumstances, may not have been a conversion. But the officer was made to know, that divers of the articles were claimed by the plaintiffs, and the bill of sale was shown to him before he sold. He chose to sell the whole, having it in his power to require indemnity, and probably taking it. Finding that there were many articles of the same kind, he would have been justified, under the circumstances, in selecting from the whole quantity in his hands, enough to correspond with the bill of sale; and if he retained the most valuable, no fault could have been found with him.

He should have set aside as many articles as appeared by the bill of sale to belong to the plaintiff and sold the residue; for he had notice of the claim, and the evidence of property was shown to him. In the case of *Bond* v. *Ward*, which has

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been cited, it was held that no action lies against the attaching officer, under such circumstances, without a demand and refusal; that is, he cannot be a trespasser or liable in trover without such demand. This applies to the taking. If he sells, knowing the property to be the plaintiffs', the sale is a conversion.[1]

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Judgment according to verdict

DANIEL CLAPP, Petitioner, *versus* WILLIAM WATSON.

Where a captain of a company of militia certified on the warrant of a sergeant, that such sergeant "has been appointed clerk of said company and has taken the oath necessary to qualify him to discharge the duties of his office," without dating the certificate, it was *held*, that the captain (then become major) might amend by affixing the date, and also that parol evidence of the time was admissible; that the oath must be presumed to have been administered by the captain; and that the certificate was sufficient, though it did not set forth the oath which was administered.

CLAPP, as clerk of a company of militia commanded by Jabez Green, made a complaint before a justice of the peace, against Watson, for neglecting to perform military duty on the first Tuesday of May, 1828. At the trial before the justice it appeared, that Clapp was appointed on the 12th of September, 1827, a sergeant of the company, which was then under the command of captain Alonzo Temple, and upon his warrant was the following certificate:--- "This certifies that Daniel Clapp, one of the sergeants of the company under my command, has been appointed clerk of said company, and has taken the oath necessary to qualify him to discharge the duties of his office. Alonzo Temple, Capt."

Watson objected that the appointment and certificate of qualification of the complainant were informal and insufficient. The complainant then moved that Temple, who at the time of the trial was major of the regiment to which the company was attached, might amend the certificate, by affixing the date when

[1] See *Lewis* v. *Whittemore*, 5 N. Hamp. R. 366; *Holbrook* v. *Hyde*, 1 Vermont R. 286; *Treat* v. *Barber*, 7 Connect. R. 275; *Ryder* v *Hathaway*, 21 Pick. 298; *Sawyer* v *Merrill*, 6 Pick. 478.

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the appointment and certificate were made and the oath administered; but the motion was overruled.

The complainant then offered Temple as a witness to testify that he administered the oath in September, 1827, and that the certificate was made and signed by him at the time of administering the oath. But the evidence was rejected as incompetent; and the justice adjudged that the certificate of the appointment and oath of office was informal and insufficient; and that Watson was not guilty in manner &c.

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Oct. 5th. And now, upon the complainant's petition for a writ of *certiorari* to the justice, it was insisted by *J. Davis* and *Allen*, for the respondent, that the want of a date to the certificate was fatal; *St.* 1809, *c.* 108, § 8; *Sherman* v. *Needham*, 4 Pick. 66; *Commonwealth* v. *Sherman*, 5 Pick. 239; but it was *resolved* by the Court, that the captain should have been allowed to amend, and also that his testimony was admissible in regard to the time of making the certificate.

It was also objected, that the oath does not appear to have been administered by the captain; but it was *resolved*, that this must be presumed. *St.* 1809, *c.* 108, § 8; *Commonwealth* v. *Cummings*, 16 Mass. R. 194.

It was further insisted, that the certificate should have set forth the oath which was administered, so that the Court might judge whether it was the oath required by law; *Lancaster* v. *Pope*, 1 Mass. R. 86; but it was *resolved*, that the certificate was sufficient in this respect.

Washburn, for the petitioner.

Certiorari awarded.[1]

[1] See Revised Stat. *c.* 12, § 51, 112; *Smith, Petitioner*, 15 Pick. 446.

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HUTCHINS HAPGOOD *versus* ISRAEL HOUGHTON, Executor.

Repugnancy between a protestation and an averment in a replication, is not a ground of demurrer.

In assumpsit against an executor, the defendant pleads that the testatrix devised land to the plaintiff in lieu and satisfaction of his demand, and that the plaintiff accepted the devise; the plaintiff, protesting that the testatrix did not make the devise in lieu, &c. and that the will was not proved, replies that he did not accept the land devised, concluding to the country. *Held*, that the replication was good.

The executor pleads, that the plaintiff was requested to make his election to take or refuse the devise, but that he refused to elect; the plaintiff replies that he did refuse to accept the devise, traversing the allegation that he refused to elect; the executor rejoins that the devise has not been waived by the plaintiff, concluding with a verification. *Held*, that the rejoinder is bad, as being a departure, and because it does not join the issue tendered by the traverse.

The executor pleads that the plaintiff did not waive or refuse the devise; the plaintiff, protesting as before, replies that he did waive and refuse to accept *any* devise contained in the will concluding to the country. *Held*, that the replication was good.

ASSUMPSIT for the board of Susan Grout, the defendant's testatrix, from June 1, 1821, to April 29, 1824.

The defendant pleaded, 2. that the testatrix devised to the plaintiff and his wife twenty-five acres of land in lieu and in satisfaction of his demand; that the will was proved; and that after the probate of the will the plaintiff accepted the land so devised.

3. As to so much of the cause of action as accrued before the 22d of April, 1824, that on that day the testatrix made her will, wherein she devised to the plaintiff and his wife twenty-five acres of land in lieu and satisfaction of so much of his demand as had then accrued; which will was proved; that after the probate of the will, the defendant requested the plaintiff to make his election to take or refuse the devise; but that he then refused and has hitherto refused to make such election.

4. As to so much &c. [as above] that the plaintiff has not hitherto waived or refused the devise, although he has had knowledge thereof ever since the decease of the testatrix.

The plaintiff, in his replication to the second plea, protesting that Susan Grout did not devise to him and his wife twenty-five acres of land in lieu, &c. and protesting that the will has never been proved, says, that he did not accept the lands so

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devised, &c. and this he prays may be inquired of by the country.

In replication to the third plea, the plaintiff, protesting that Susan G. did not devise, &c. and that the will has never been proved, says, that he refused to accept *any* devise contained in the will, in lieu and satisfaction of so much of his demand &c. and has ever since refused and still does refuse to accept the same in lieu &c. ; without that, that he did refuse to elect to take or refuse the devise.

In replication to the fourth plea, the plaintiff, protesting as before, says he did waive and refuse to accept any devise contained in the will ; concluding to the country.

To the replication to the second plea, the defendant demurs for the following causes : —

1. Because the plaintiff has protested the devise set forth, and has also denied and traversed that he accepted the same ; which protestation and denial are repugnant and insensible, inasmuch as the protestation denies that any such devise was made, and the traverse of the acceptance admits the devise.

Also, for that the matters protested by the plaintiff are essential and necessary parts of the second plea, and issue might have been taken on those matters by the plaintiff.

Also, for that the plaintiff has not traversed any allegation in the second plea, but has replied generally, that he did not accept any lands devised to him, and prayed that the same may be inquired of by the country.

To the replication to the third plea the defendant rejoins, that Susan G. did devise twenty-five acres of land to the plaintiff and his wife, &c. which devise has not been and is not waived by the plaintiff ; and this he is ready to verify.

To the replication to the fourth plea the defendant demurs, for the two first causes (*mutatis mutandis*) assigned in regard to the replication to the second plea ; and 3. for that the plaintiff has not taken issue upon any allegation, or replied that he had waived the particular devise mentioned in the plea, but has replied that he did waive *any* devise contained in the will ; which is nonsensical and no answer to the fourth plea.

The plaintiff joins in the foregoing demurrers.

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To the rejoinder to the replication to the third plea, the plaintiff demurs for the following causes: —

1. Because the rejoinder is a departure from the plea, in this; — the plea alleges that the defendant requested the plaintiff to make his election to take or refuse the devise, but that the plaintiff refused to make such election; the replication traverses that allegation; and the rejoinder alleges that the devise has not been and is not waived.

2. The rejoinder alleges no new matter, or matter substantially different from that contained in the plea, and yet concludes with a verification, whereas it ought to have joined the issue tendered by the traverse in the replication.

Burnside and *Hinds*, for the plaintiff.

Bigelow and *Brooks*, for the defendant.

Per Curiam. The replications to the second and fourth pleas are unquestionably good, both containing a direct denial of the principal traversable fact set forth in the pleas, and being in good form. *Oct. 5th.*

As to the protestation and the averment being contradictory or inconsistent, we know of no such ground for sustaining a demurrer.

As to the third plea, the replication is suited to it, and the issue tendered should have been joined, instead of pleading further by a rejoinder; in which there is a palpable departure, as well as refusal to take issue upon the traverse.

COMMONWEALTH *versus* JONAS WHITE.

By *St.* 1785, *c.* 28, § 1, a person committing certain trespasses therein specified is subjected to a fine, to the use of the Commonwealth, to be recovered on complaint before a justice of the peace; and by *St.* 1800, *c.* 57, § 4, all penalties and forfeitures given or limited by any act, in whole or in part, to the use of this Commonwealth, may be recovered by indictment in any court proper to try the same. *Held*, that the Court of Common Pleas have original jurisdiction of the offences enumerated in the first section of the statute of 1785.

THE defendant was convicted on an indictment for perjury in his testimony before the grand jury for the Court of Common Pleas; which testimony related to the offence of break-

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ing glass, supposed to have been committed by certain persons, against the provisions of *St.* 1785, *c.* 28, § 1. The defendant moved in arrest of judgment, that the offence of breaking glass is, by the provisions of the statute, exclusively cognizable by justices of the peace; and therefore his testimony before the grand jury was extra-judicial.

The case was submitted without argument.

Davis, Solicitor-General, for the Commonwealth.

J. Davis and *Kendall*, for the defendant.

Oct. 6th. PARKER C. J. delivered the opinion of the Court. The question is, whether the Court of Common Pleas had jurisdiction of the offence, in regard to which the defendant is alleged to have committed the crime of perjury; if it had not jurisdiction, the whole matter was *coram non judice*, and therefore no oath could be lawfully administered.

By *St.* 1785, *c.* 28, this offence was to be prosecuted by a complaint before a justice of the peace; so that under that statute, the Court of Sessions, or its successor, the Court of Common Pleas, had no original jurisdiction. But by *St.* 1800, *c.* 57, § 4, it is provided, "that all penalties and forfeitures given or limited by any act of this Commonwealth, in whole or in part, to the use of this Commonwealth, may be recovered by indictment in any court proper to try the same."

By *St.* 1785, *c.* 28, which creates the offence in regard to which the defendant testified before the grand jury, the whole penalty was given to the Commonwealth; so that this case comes clearly within the words of *St.* 1800, *c.* 57, § 4. The only question therefore is, whether the Court of Common Pleas was the proper court for the trial of the offence. As general authority was given to the Court of Sessions to try all misdemeanors for which the punishment was fine or imprisonment, and all the powers of the Court of Sessions in criminal matters are transferred to the Court of Common Pleas, the authority of the latter court is unquestionable.

Motion overruled.

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CALVIN LEFFINGWELL *et al. versus* SAMUEL D. ELLIOTT.

An act, incorporating individuals for a particular purpose, does not vest in the corporation, land previously owned by them as tenants in common and previously used for the same purpose.

Parol evidence is not admissible to show that a deed given by one of such tenants in common, of his share in the stock of the corporation, was intended to pass his share of the land.

If a grantee of land with warranty, being evicted by a paramount title, extinguishes such title for a nominal consideration, he can recover upon the warranty the amount of such consideration only, together with a reasonable compensation for any trouble and expense to which he may have been put in procuring the extinguishment.

THIS was an action for breaches of covenants against incumbrances and of warranty, contained in a deed of real estate, dated January 13, 1825, given by the defendant to the plaintiffs.

It was agreed that on the 28th of December, 1814, Eddy, one Watson, and fourteen others, were tenants in common, in fee simple, of seventy-five acres, parcel of the land conveyed to the plaintiffs, and that while they were so tenants, they used the same for the purposes of a manufacturing establishment, until June 13, 1815, when they were incorporated by an act of the legislature, (*St.* 1815, *c.* 3,) by the name of the Oxford Cotton Manufacturing Company. This parcel of seventy-five acres was never conveyed by Eddy and the other proprietors to the corporation, nor ever vested in the corporation, unless it so vested by force of the act of incorporation and by operation of law. The act of incorporation makes no allusion to this land, but merely authorizes the corporation to hold real estate. The corporation was organized agreeably to the statutes regulating manufacturing corporations, and the corporate stock was divided into a certain number of shares. The defendant derived his title, if any, to the seventy-five acres, by purchasing of the several corporators, for the time being, the whole of the shares, and taking as vouchers of such purchase certain corporation certificates, under seal, in the following form — "This certifies that A. B. is owner of share No. ——. value estimated at 1000 dollars;" — together with deeds of transfer, by

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which the corporators "give, grant, sell and convey, and to farm let" their respective "shares." The defendant gave a fair market price for the shares, considering them to embrace the seventy-five acres, and those persons of whom he bought were aware, that in making the purchase, he expected to acquire a title in fee to this land.

If the evidence was admissible, it was agreed that it could be proved, that the members of the corporation and the original owners of the real estate in question, considered the shares in the company to be made up of the real and personal estate in their possession, and supposed that by the act of incorporation the real estate was transferred to the incorporated company and would pass by the transfer of its scrip.

While the plaintiffs were in possession of the land conveyed to them, claiming to hold in fee simple, Eddy entered upon the seventy-five acres for the purpose of regaining seisin and possession thereof to the use of himself and others, he and they claiming to be owners thereof in common. Whereupon the plaintiffs yielded the possession, and took from Eddy a lease of his share for 999 years, for the consideration of one cent. The plaintiffs paid divers sums of money to the original proprietors for the purpose of obtaining from them acquittances of their supposed interest in the seventy-five acres. Some of these acquittances were obtained at the instance of the plaintiffs alone, and others at the joint instance of the plaintiffs and the defendant.

On the 8th of July, 1826, R. Newton levied an execution upon an undivided thirty-second part of a portion of the seventy-five acres, as the estate in fee simple of Watson, and thereby acquired the interest, if any, which Watson had in the same.

If the action could be sustained, an auditor was to be appointed to ascertain the damages.

Sept. 30th. *Newton* and *Barton*, for the plaintiffs, contended that the title to the seventy-five acres had not vested in the corporation, and that it did not pass by the transfer of the certificates of "shares" in the corporation stock. This land is not sufficiently described in the deeds of transfer; *Worthington* v. *Hylyer*, 4 Mass. R. 205; and the parol evidence offered to

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show that it was the intention of the parties to convey it, is not admissible.

In regard to damages, they said the plaintiffs were willing to take the sum actually paid by them to extinguish the paramount title, if they were allowed a reasonable compensation for their trouble in effecting it; *Sumner* v. *Williams*, 8 Mass. R. 162; otherwise they claimed the value of the land at the time of the eviction. *Gore* v. *Brazier*, 3 Mass. R. 523.

J. Davis and *Allen*, *contrà*. The corporation property consisted of real and personal estate, and the whole passed by the deeds of the stockholders. The claim made by the grantors of the defendant was founded in fraud; and if the parol evidence is admissible, it appears they intended to convey the land now in question. To show that it was admissible, they cited *Thomas* v. *Thomas*, 6 T. R. 671; 3 Stark. Ev. 1021, 1026; *Doe* v. *Burt*, 1 T. R. 701; *Kerslake* v. *White*, 2 Stark. Rep. 508; *Powell* v. *Biddle*, 2 Dallas, 70; *Livingston* v. *Ten Broeck*, 16 Johns. R. 14; *Worthington* v. *Hylyer*, 4 Mass. R. 196; *Leland* v. *Stone*, 10 Mass. R. 459; *Hatch* v. *Hatch*, 2 Hayw. 32.

Per Curiam. The mere incorporation of tenants in common to enable them to carry on more conveniently a common object, does not vest in the corporation a title to the land which had been previously used by the individuals for the same purpose. The title must be conveyed by proper deeds from the individuals to the corporation. The deed of a "share" in the present case could convey to the defendant only the incorporeal right which the grantor had in the corporation. No real estate was conveyed by it, nor did it contain a description of any land. It meant to grant only what was the subject of the corporation certificate, that is, the corporate property. It is clear then, there being no conveyance of the land in question to the corporation, and none by the individual owner to the defendant, that there was an outstanding paramount title; against which the plaintiffs have a right to be indemnified. Oct. 6th

In regard to damages, if the plaintiffs extinguished the paramount title for a nominal sum, they were entitled to recover no more of the defendant. If they were put to trouble and

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expense in procuring the extinguishment, that is a proper ground of damages.[1] The lease for 999 years is like an estate in fee, and it was for the benefit of the defendant to have the paramount title extinguished by a conveyance of that kind.

Oxford Bank *versus* Levi Lewis.

Where a promissory note was signed by B and H as principals, and by the defendant as surety, it was *held*, that the reception of interest in advance, of the principals, by the holders, after the note was overdue, did not discharge the surety.

Upon a case stated it appeared, that the action was brought upon a joint and several promissory note for 375 dollars, dated June 12, 1826, payable to the plaintiffs or order in fifty-seven days, and signed by Hollis Bruce and Rufus Houghton as principals, and Stephen Lawton and the defendant as sureties. In February, 1827, Houghton, in addition to two payments by him on the note in 1826, paid the interest for 60 days, in advance; but the sureties were not present at such payments. Houghton absconded on May 4, 1827, carrying off all his property with him; and Bruce failed in February, 1827. Notice of the non-payment of the note was given to the defendant in June, 1827.

The plaintiffs were to become nonsuit or the defendants to be defaulted, according to the opinion of the Court.

Sept. 30th.

Merrick, for the defendant, contended that the receiving of interest in advance, without the knowledge of the surety, was a contract to delay the collection of the note and operated as a discharge of the surety. 3 Stark. Ev. 1390; *Hill* v. *Bull*, Gilmer, 149; *Jones* v. *Bullock*, 2 Bibb, 467; *Hunt* v. *Bridgham*, 2 Pick. 581; *Bellows* v. *Lovell*, 4 Pick. 153; *Gould* v. *Robson*, 8 East, 576; *English* v. *Darley*, 2 Bos. & Pul. 61; *Clark* v. *Devlin*, 3 Bos. & Pul. 365; *Smith* v. *Becket*, 13 East, 187; *Boultbee* v. *Stubbs*, 18 Ves. 20.

Barton, for the plaintiffs, cited *Orme* v. *Young*, 1 Holt's N. P. Cas. 87; *Hunt* v. *Bridgham*, *ubi sup.*; *Frye* v. *Barker*, 4 Pick. 382; *Crane* v. *Newell*, 2 Pick. 612.

[1] See *Swett* v. *Patrick*, 3 Fairfield, 9.

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PARKER C. J. delivered the opinion of the Court. The defendant was an original promisor, and is to be treated in all respects as such, though he is described in the note as a surety, unless some new contract has been made with those who are described as principals, which would prevent him from bringing an action. Mere delay to call on or sue the principal will not discharge the surety, as is settled in the case of *Hunt* v. *Bridgham*.

If the plaintiffs had, by any contract with the principals, disabled themselves from suing, or the surety from taking up the note in order to secure himself, a defence might be maintained. The only circumstance relied on to show this is, that after the note became due, they received the interest for sixty days in advance, which was by implication giving a new credit for that time. But they retained the power of suing and might, if they had apprehended a failure, have made an attachment. We see no ground of defence.[1]

Defendant defaulted.

[1] See *Freeman's Bank* v. *Rollins*, 13 Maine R. (1 Shepley,) 202; *Central Bank* v. *Willard*, 17 Pick. 150; *Blackstone Ban't* v. *Hill*, 10 Pick. 129; 2 Pick. (2d edit.) 585 and cases cited in notes; 14 Wendell, 165; 10 Peters, 257.

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The President &c. of the Boston Bank *versus* Silas Reed Junior *et al.*

Where a mortgagee brings a writ of entry against the mortgager, without declaring upon the mortgage, and recovers a judgment at common law, by virtue of which he enters upon the mortgager, the mortgager is not liable in trespass for mesne profits.

So where the grantee of an equity of redemption conveyed the same to a stranger, but still continued in possession, and the mortgagee brought a writ of entry against him, not declaring on the mortgage, and recovered a judgment at common law and entered upon the tenant by virtue thereof, but showing no title except under the mortgage, it was *held*, that the tenant was not liable to the mortgagee for mesne profits.

Where the tenant in such writ of entry, denying his liability for mesne profits, nevertheless gave his promissory note to the mortgagee for a sum equivalent to the value of the mesne profits for a portion of six years, with the understanding, however, that if certain persons, to whom he was to apply, should say he was not liable, the note should be given up, but he never made such application, it was *held*, that he was not estopped to say that the note was without consideration and void.

Assumpsit on a promissory note, dated September 25, 1827, for 100 dollars, given by Silas Reed junior as principal and the other defendant as surety.

At the trial, before *Putnam* J., it was proved, that at the Court of Common Pleas, September term 1827, the plaintiffs
460 recovered judgment at common law, in a writ of *entry sur disseisin* against Silas Reed junior, in which they counted on their own seisin within thirty years and a disseisin by Reed A writ of possession on that judgment was regularly executed, and seisin of the demanded premises was delivered to the attorney of the demandants. The land recovered was formerly owned by one Chaddock, who mortgaged it to the demandants in 1803; and no evidence was offered by the demandants, of any title other than the mortgage. The right in equity was conveyed to Silas, who conveyed the demanded premises by absolute deed, dated December 4, 1824, to Lewis H. Reed, but continued in possession, as before, till September 25, 1827. Immediately after the execution of the writ of possession, and on the same day, Lewis conveyed all his interest in the land to the plaintiffs. No interest had been paid on the mortgage since 1814. On the same day the attorney of the plaintiffs demanded of Silas the rents and profits of the

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estate for three years next preceding the recovery in the writ of entry, or from the date of his deed to Lewis. Silas denied that he was liable in law to pay the back rent, but after inquiring of the attorney whether he was in fact liable to pay such rent, and being informed by him that in his opinion he was so liable, he consented that his tenant for the then current year should pay the plaintiffs the rent for that year, being 50 dollars, and that he would give his note as principal, with the other defendant as surety, for 100 dollars; with this understanding, however, that the defendants might take the opinion of three lawyers named, and if two of them should express an opinion that Silas would not be liable in an action of trespass for mesne profits, the note should be given up. The defendants were to make the application to those lawyers, and were to give notice to the plaintiffs' attorney, of the time of the application. No such application was ever made; and on the 21st of January, 1828, the attorney sent a letter to Silas, stating that as no such application had been made, he should consider the question as given up, and that the note would be paid. The present suit was commenced in February, 1828.

Upon the foregoing evidence the judge directed a nonsuit, with leave to the plaintiffs to move to have it taken off.

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Oct. 3d

Burnside now moved to take off the nonsuit. The plaintiffs claimed the rents and profits for six years, and Silas Reed junior thought he was not liable at all; and by way of compromise, he gave the note now in suit. If he had procured an opinion in his favor from the lawyers to whom the question of his liability was referred, the plaintiffs would have been bound by it; consequently the agreement was binding upon him. So that the question, whether he was liable in trespass for mesne profits, is no longer open.

But if the defendants would not be liable on the note, unless Silas was liable in trespass for mesne profits, it is apprehended that he was so liable. The record states a seisin within thirty years, but the evidence showed a seisin within twenty, Silas having entered upon the land in 1817; and this evidence, connected with the recovery, is conclusive evidence of a right to an action of trespass for mesne profits. *Emerson* v. *Thompson*, 2 Pick. 487; *Baron* v. *Abeel*. 3 Johns. R. 481; *Jack-*

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Boston Bank v. Reed.

son v. *Randall*, 11 Johns. R. 405; Stearns on Real Actions, 421. The only ground of defence must be, that Silas R. entered upon the mortgager and that he stands in the situation of a mortgager. *Wilder* v. *Houghton*, 1 Pick. 87; *Fitchburg Cot. Man. Co.* v. *Melven*, 15 Mass. R. 268; *Gibson* v. *Farley*, 16 Mass. R. 280. If a mortgager should appear and move for the conditional judgment in a writ of entry at common law, the case would be like an action upon the mortgage; but if he lies by, he cannot afterward rely on the mortgage, in an action for the mesne profits. There is no privity of contract between the mortgagee and a purchaser of the equity of redemption; the mortgagee finds the purchaser in possession, without knowing how he came there, and if the purchaser lies by and suffers a recovery at common law, he must abide by the consequences. *Green* v. *Kemp*, 13 Mass. R. 519; *Partridge* v. *Gordon*, 15 Mass. R. 486; *Jackson* v. *Fuller*, 4 Johns. R. 215; *Keech* v. *Hall*, 1 Doug. 21.

All the right of Silas R. was transferred by him, and yet he remained in possession. He should be liable for the rents and profits at least from the time when he ceased to have any title. He might have pleaded that he was not tenant to the freehold, but he did not, and he cannot now set up that defence in an action for the mesne profits.

462 *J. Davis* and *Allen*, *contrà*, contended that the note was void for want of a consideration, Silas R. not being liable to the plaintiffs for mesne profits. *Wilder* v. *Houghton*, *Fitchburg Cot. Man. Co.* v. *Melven*, *Gibson* v. *Farley*, and *Green* v. *Kemp*, before cited; *Freeman* v. *Boynton*, 7 Mass. R. 488; *Warder* v. *Tucker*, ibid. 449.

Oct. 6th. Wilde J. delivered the opinion of the Court. It has been argued for the plaintiffs, that the note, being given on the compromise of a doubtful and contested right, is binding; but we think it manifest that there was no compromise, as Silas Reed junior denied his liability, and that question was agreed to be submitted to the opinion of counsel; and as it has not been thus decided, it must be now determined in this action. It is generally true, that a judgment in a writ of entry is conclusive evidence of the right to recover in an action of trespass for mesne profits; but a judgment in favor of a mortgagee against the

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mortgager is an exception to the general rule; for the principle is well settled, that a mortgager is not liable for rents and profits. *Wilder* v. *Houghton*, 1 Pick. 87; *Fitchburg Cot. Man. Co.* v. *Melven*, 15 Mass. R. 268; *Mead* v. *Lord Orrery*, 3 Atk. 244; *Keech* v. *Hall*, 1 Doug. 20; *Higgins* v. *York Buildings Co.* 2 Atk. 107.[1]

The form of the action cannot affect the rights of the parties. But as the plaintiffs declared generally on their seisin, it was competent for them to show in this action, that they had an absolute indefeasible title to the land. This they have not attempted to show, and we must conclude, therefore, that their only title is under the mortgage. But they contend that Silas Reed junior was not in under the mortgager after his conveyance to his brother. We think however that this position cannot be maintained. After this conveyance he held as tenant at will or at sufferance under his brother. He certainly was not in under the mortgagee.

We are therefore of opinion, that the plaintiffs could not maintain an action of trespass for mesne profits on the facts reported; and consequently, that the note sued was given without consideration

Motion to take off the nonsuit overruled.

COMMONWEALTH *versus* The Inhabitants of NORTH BROOKFIELD. 463

An indictment against the town of N. B. for not repairing a highway, alleged that there was a highway leading from a meetinghouse in the town of B, to the dividing line between B. and N. B. and thence in N. B. to the meetinghouse in N. B., and that the defendants allowed "a certain part thereof, consisting of twenty rods in length," to be out of repair. *Held*, that the indictment was defective, inasmuch as it was left uncertain in which of the towns the unrepaired part of the highway lay.

THIS was an indictment, in which it was alleged, that there was "a certain common and public highway and town road in the town of North Brookfield in said county, leading and pass-

[1] See *Cavis* v. *M'Clary*, 5 N. Hamp. R. 530; *Pope* v. *Biggs*, 9 Barn. & Cresw. 245.

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Commonwealth v. North Brookfield.

ing from the Baptist meetinghouse in the town of Brookfield to the dividing line between the towns of Brookfield and North Brookfield, and thence in said North Brookfield by the dwelling of the widow Converse to the North Brookfield meetinghouse, &c. which said public highway and town road the inhabitants of the town of North Brookfield &c. are bound &c. to make, maintain, &c. and that the said inhabitants &c. did &c. and still do suffer, permit and allow a certain part thereof, consisting of twenty rods in length and two rods in breadth, to be deeply covered over with the waters of the pond, &c. so that the same cannot be used and enjoyed by the citizens &c. for a common highway," &c. to the common nuisance, &c.

At the trial, the defendants objected to the sufficiency of the indictment, and the jury having found a verdict against the defendants, the question was reserved for the consideration of the whole Court.

Sept. 30th. *J. Davis* and *Allen*, in support of the objection, cited *Rex* v. *Hartford*, Cowp. 111.

Merrick, for the Commonwealth.

Oct. 6th. *Per Curiam.* We think it very clear, that there is a defect in the description of the road, which is fatal to the indictment.

It is averred, that there is a public way and town road in the town of *North Brookfield*, leading and passing from the Baptist meetinghouse in the town of Brookfield to the dividing line between the towns of Brookfield and North Brookfield, and

464 thence in North Brookfield by the dwellinghouse of the widow Converse to the North Brookfield meetinghouse. And then it is averred, that the inhabitants of North Brookfield did permit and allow a *certain part thereof*, to wit, twenty rods, &c. to be out of repair. A certain part of what? Of a road described; which is partly in Brookfield and partly in North Brookfield; leaving it wholly uncertain, in which of the towns the unrepaired part of the road is. It should have been averred that a certain part thereof, lying in North Brookfield, &c. This objection being taken at the trial, the verdict must be set aside and the defendants discharged.

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SAMUEL STONE *versus* JOHN HOBART, Administrator, with the Will annexed, of William Watson.

A and B were sureties on a bond for C; a suit was brought on the bond, and A paid it; A died, and by his will made C his residuary legatee and devisee. A's estate was sufficient to pay all debts and legacies, and to leave a surplus for C, which however would not be sufficient to pay all the debts of C, who was insolvent. A's administrator sued B to recover a contribution from him as co-surety on the bond; and B brought a bill for an injunction against the suit at law *Held*, that this Court had no jurisdiction of the case under *St.* 1817, *c.* 87.

This Court refused to give an opinion, whether the facts stated were a defence to the suit at law, which was pending in the Common Pleas, although the parties had agreed to submit the question to this Court, and to be bound by the decision.

THIS was a suit in equity. The plaintiff's bill alleged, that during the life of the defendant's testator, the plaintiff and the testator became sureties for Samuel D. Watson, on a guardianship bond given by the latter as principal, to the judge of probate; that judgment was recovered on the bond against the three obligors, on which an execution issued, which was satisfied out of the estate of the testator.

The bill further alleged, that the testator's will made Samuel D. Watson, who was his only son, his executor, and residuary legatee and devisee; that Samuel D. Watson, being unable to give bonds as executor, the defendant was duly appointed administrator with the will annexed; that the personal and real property left by the testator was more than sufficient to pay all the debts and legacies due from the estate, and that a large balance would still remain for Samuel D. Watson, as resid- 466
uary devisee; that Samuel D. Watson, when his father died, was insolvent, and still continued so, though some of his creditors had satisfied their debts out of his interest in his father's estate.

The bill further alleged, that it was not necessary for the payment of the debts, legacies and charges due from the testator's estate, that the defendant, as administrator, should recover from the plaintiff, as co-surety with the testator, any part of the money paid by the testator on the bond; and if the defendant should recover any part of it from the plaintiff, he would hold it wholly in trust for Samuel D. Watson, the principal on the bond; and that if the defendant should pay it over

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to Samuel D. Watson, the plaintiff would be utterly unable to recover it back from the latter.

The complaint of the bill was, that the defendant, knowing the premises, had brought a suit in the Common Pleas against the plaintiff for the money paid by the testator on the bond, which action was still pending.

The plaintiff further showed, that he had not, in his opinion, any defence at law to the action; that the defendant's only claim to recover was as a trustee in law under the will, and in the settlement of the estate, of the deceased; and that in equity the defendant ought not to be permitted to recover in that suit.

The prayer of the bill was, that the defendant should be restrained by injunction from proceeding in his suit in the Common Pleas.

The defendant demurred to the bill.

The parties also filed an agreement in the case, by which they requested, that if the Court were of opinion that they had not jurisdiction or authority to grant the injunction, and yet that the facts stated in the bill would be a defence to the action at law, the Court would decide accordingly; and they agreed that the decision should be binding on the parties in the same manner as if that suit were pending in this Court.

Oct. 2d. *J. Davis* and *Washburn*, for the plaintiff. This Court has jurisdiction of this case under *St.* 1817, *c.* 87, giving them equity powers in "all cases of trust arising under deeds, wills or in the settlement of estates;" the administrator is the trus-

466 tee, Watson the *cestui que trust*, and the property devised is the trust property. *Dwight* v. *Pomeroy*, 17 Mass. R. 327; 1 Madd. Ch. Pr. 553, 577, 578, 286; *Winship* v. *Bass*, 12 Mass. R. 202; *Dawes* v. *Boylston*, 9 Mass. R. 352; *M'Kay* v. *Green*, 3 Johns. Ch. R. 56.

If the Court have jurisdiction, it is a proper case for an injunction; for Watson, the person for whose benefit the money is recovered, will become liable to repay it to the plaintiff as soon as the plaintiff has paid it to the defendant, the administrator. 1 Madd. Ch. Pr. 130, 134, 451, 455; Com. Dig *Chancery*, *D* 9; *Hill* v. *Turner*, 1 Atk. 516; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 336; Eden on Inj. 3; *Anony-*

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mous, 1 Atk. 491 ; Toll. Ex. 489 ; Coxe's Dig. 726 ; Tidd's Pr. 604 ; *Winch* v. *Keeley*, 1 T. R. 622 ; *Ward* v. *Lewis*, 4 Pick. 523 ; Com. Dig. *Princ. and Surety, H ; Miller* v. *Ord*, 2 Binney, 382 ; *Praed* v. *Gardiner*, 2 Cox, 86 ; *Hanson* v. *Gardiner*, 7 Ves. 307 ; *Foster* v. *Spencer*, 2 Johns. Ch. R. 171 ; *Boultbee* v. *Stubbs*, 18 Ves. 20 ; *Simson* v. *Hart*, 14 Johns. R. 63, 74, 75.

Newton, for the defendant, contended that the Court had no jurisdiction under the statute of 1817. *Hunt* v. *Maynard*, 6 Pick. 489. It is evident from the legislature's having expressly granted a power to issue injunctions in certain cases, that no such power was intended where it was not expressed. *St.* 1827, *c.* 88.

PARKER C. J. delivered the opinion of the Court. This bill shows a very clear case of equity ; but not such a one as is within the jurisdiction of this Court ; and the remedy for the plaintiffs must be at common law. We have no power in chancery, except by statute ; and the general authority to issue injunctions has not been given. The exercise of such a power exists only when the subject matter falls within the jurisdiction granted by the legislature ; such as the case of trust created in the manner prescribed in *St.* 1817, *c.* 87, or partnerships, waste or nuisance, provided for in subsequent statutes. Injunctions against proceeding at law are within the general jurisdiction of chancery, which we are not authorized to assume. But it is insisted that Hobart, against whom the bill is filed, is a trustee within the meaning of *St.* 1817, *c.* 87 ; because, being administrator of William Watson, and Samuel D. Watson being residuary legatee, Hobart should be considered a trustee on a trust arising in the settlement of an estate. We have not been able yet precisely to ascertain the meaning of the legislature in this last branch of trusts, specified in the act giving this Court equity jurisdiction. If thereby an executor or administrator is rendered a trustee and liable to this process, we think it must be only in favor of heirs, legatees, creditors or others interested in the settlement and disposition of the estate. There is certainly no relation of trustee and *cestui que trust* between the present plaintiff and the administrator. They stand in the relation only of debtor and creditor. This bill

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must be dismissed; and we decline determining, extrajudicially, whether the matter alleged will constitute a defence in the suit at law, pending against the present plaintiff in favor of Hobart, as administrator. That question must come before us in another shape.

JONAS WHITE *versus* HEMAN RAY.

Where in an action for a malicious prosecution it appeared that the defendant had caused the plaintiff to be twice indicted, and that the attorney of the Commonwealth had entered a *nolle prosequi* on the second, "it appearing that the accused has been formerly acquitted of the offence charged against him in this indictment," it was *held*, that the defendant might notwithstanding show that the second indictment was for a different offence from the one first charged, and that so there was probable cause for the second accusation.

There is a material variance between an indictment "for drawing and depositing in and across a highway a quantity of stones," and one "for building a stone-wall in and upon the same highway;" and in an action for a malicious prosecution brought against the prosecutor of the last-mentioned indictment, it being proved that the plaintiff was guilty of the offence therein charged, and it not appearing, upon proper averments, that the two indictments were for the same offence, it was *held*, that the defendant had shown probable cause for the prosecution.

THIS was an action for a malicious prosecution in procuring an indictment against the plaintiff for a nuisance, in 1826.

The supposed nuisance consisted in the plaintiff's having put his stone-wall in the highway, in Westminster. It was proved that the plaintiff was indicted in 1817, upon the complaint of the defendant, for having, on the 5th day of April of that year, "drawn and deposited a quantity of large stones in
468 and across said road," and that he was tried and acquitted. The indictment of 1826, which was also procured upon the defendant's complaint, alleged that on the first day of January 1825, the plaintiff "caused to be built a certain stone-wall in and upon a part of the common and public highway and town road aforesaid, to wit, upon two thousand square feet of the said common and public highway," &c. At the December term 1827 of the Common Pleas a *nolle prosequi* was entered upon this indictment, "it appearing," says the attorney of the Commonwealth, "by a copy of a record filed in the case, and of the affidavit appended thereto, that the defendant has been

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formerly acquitted of the offence charged against him in this indictment."

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It was proved that the wall stands about eighteen inches within and upon the highway; and that the foundation of it remained in 1826, and ever since, as it was in 1817, having been erected by the defendant previously to the year 1817; but the defendant, after he was acquitted in 1817, brought stones into the road and laid them upon the old foundation, and built the wall higher than it was, but did not make it project further into the road; and the defendant has repaired it since the year 1817, by laying up the stones which have fallen from time to time.

The jury were instructed, that these facts did not prove a probable cause for the last prosecution. The instruction was with a view to have the opinion of the jury upon the question of malice, and of damages if they should find malice; it being considered that the want of probable cause was evidence of malice, but not conclusive evidence; and the defendant relied upon various facts to disprove malice.

The jury found a verdict for the plaintiff. But if the whole Court should be of opinion that the facts proved did amount to probable cause for the prosecution of the last indictment, the plaintiff was to become nonsuit.

Merrick, for the defendant. Entering the *nolle prosequi* does not show a want of probable cause. *Commonwealth* v. *Wheeler*, 2 Mass. R. 172; 2 Hale's P. C. 346. Where a nuisance continues, it may be the subject of a new indictment, and an acquittal on an indictment for the same nuisance at a former period, will not be a bar. *The King* v. *Wandsworth*, 1 Barn. & Ald. 63; *Rex* v. *Burbon*, 5 Maule & Selw. 392; *Rex* v. *Reynell*, 6 East, 316; 1 Stark. Ev. 223; 3 Stark. Ev. 672; 1 Chit. Cr. L. 452, 457; 2 Chit. Cr. L. 607, note *a*; 2 Hale, 241; *Rex* v. *Taylor*, 3 Barn. & Cressw. 502; *Standish* v. *Parker*, 2 Pick. 20; [2d edit. 22, notes;] Bac. Abr. *Nuisance*, *D*.

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Kendall, for the plaintiff, contended that a person once indicted for a nuisance and acquitted, cannot be indicted for the continuance of the nuisance; for it is the same offence. A person stealing goods in one county and carrying them into

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another, might as well be indicted of larceny in this last county after an acquittal in the first. 4 Bl. Com. 335; 2 Hawk. P. C. c. 35; *Rex* v. *Cohen*, 1 Stark. R. 516; *Rex* v. *Mann*, 4 Maule & Selw. 337; *The King* v. *Wandsworth*, 1 Barn. & Ald. 63; *Commonwealth* v. *Goddard*, 13 Mass. R. 455; 1 Stark. Ev. 222, 224.

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PARKER C. J. delivered the opinion of the Court. It was proved in this case, that the plaintiff erected and maintained a stone-wall, which lay eighteen inches within the highway, for obstructing which he was indicted by the procurement of the defendant. A *nolle prosequi* was entered upon the indictment, in 1827, by the county attorney for the Commonwealth, because, as he says, it appeared that the defendant had been formerly acquitted of the same offence.

The defendant in this action has a right, notwithstanding this entry, to show that there was probable cause for the last prosecution; and he does it, by showing the existence of the nuisance; unless the acquittal in the former prosecution is a bar to any subsequent indictment. And it can be no bar certainly, unless the offences in the two prosecutions are identical.

If the former acquittal had been pleaded in bar, it must have been averred, that the obstruction, for which he stood indicted, was one and the same with that of which he had been acquitted. Indeed some of the authorities cited maintain, that a second prosecution may be supported for the very same offence. But this we do not affirm.

Now by recurring to the indictment of 1817, and comparing it with that of 1826, it will appear, that there is a substantial difference between them. The charge in the former is, that
470 the plaintiff drew and deposited in and across the said road a *quantity of large stones*. In the latter the charge is, that he caused and procured to be erected and built a certain stone-wall in and upon a part of the common and public highway aforesaid. There is a material variance between the two; and he might well have been acquitted of the former, and convicted of the latter offence. It does not appear, nor could it, except by pleading with proper averments, that drawing and depositing large stones in and across the road, was the same act as the building a stone-wall on the road.

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It being proved then, that the plaintiff actually built a wall upon the road, there was probable cause for the prosecution; and therefore the verdict must be set aside and a nonsuit entered.

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Ebenezer D. Ammidown *versus* Calvin Wheelock, Principal, and William Healy Junior, Trustee.

Where a debt has been assigned by the creditor, and the debtor is afterward summoned as his trustee, in order to entitle the assignee to the benefit of his assignment, it is not necessary that he should give notice of it to the debtor before the service of the trustee writ on him; it is sufficient if the notice is given at any time before he has made his answer.

Where such an assignment is disclosed in the answer, and the assignee desires to become a party to the suit under *St.* 1817, *c.* 148, and the Court of Common Pleas refuses to let him become a party, he may bring the question before this Court by a bill of exceptions, and upon a reversal of the decision below, may have a jury trial before this Court.

In order to entitle the assignee to become a party under the statute, it is not necessary that he should offer to the person summoned as trustee, any evidence of the assignment, beyond his own statement; it is sufficient if he gives the trustee, before his answer, notice of what appears to be a valid assignment.

Where a note not negotiable is assigned, and the maker is subsequently summoned as trustee of the payee, in order to entitle the assignee to become a party to the suit, it is not necessary that he should exhibit the note to the trustee when he gives the trustee notice of the assignment.

In the Common Pleas the trustee made the following disclosure.

On October 11, 1828, he made a note not negotiable, by which he promised to pay the defendant 56 dollars on demand with interest. He was summoned in this action *early in the evening* of the same day, he thinks between *six and seven o'clock*. A few days afterwards Smith Tourtellott informed him, that he, Tourtellott, had purchased the note of the defendant, and requested the trustee to pay it to him, Tourtellott. He then informed Tourtellott of the service of the trustee process upon him. Tourtellott, on November 29, 1828, handed the trustee a written notice signed by Tourtellott, in the following words, viz. "This is to give you notice, that I purchased a note of hand [describing the note above mentioned]

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on the same day of the date of said note, about *three of the clock* in the afternoon of the said day. I sold said Wheelock a pair of oxen, and took the abovementioned note towards the payment of said oxen." The notice was accompanied by a certificate signed by the defendant, that he had transferred the note to Tourtellott, as stated by Tourtellott. The trustee, in the afternoon of October 11, before the service of the writ upon him, saw the defendant's boy driving a pair of oxen which the trustee supposed to be the same which Tourtellott stated that he had sold to the defendant.

At the next term of the Common Pleas after the answers were given, and before the court had given any opinion upon them, Tourtellott appeared, and presented a petition, in which he requested the court to permit him to become a party to the suit, in order that he might have a jury to try the validity of the assignment, according to the statute; but the court refused to grant the petition, and adjudged Healy to be trustee.

To this refusal and judgment Tourtellott filed exceptions

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Lee and *Bottom*, for Tourtellott. Tourtellott, as assignee, was entitled to become a party to the suit and have the validity of the assignment tried by a jury. *St.* 1817, *c.* 148, § 1; *Adams* v. *Robinson*, 1 Pick. 461. If the plaintiff disputes the validity of this assignment, he also has the right of having it tried by a jury, which is all that he can reasonably require. *Gordon* v. *Webb*, 13 Mass. R. 215. There was no neglect in Tourtellott in giving notice of the assignment, for it is well settled that a notice given at any time before the trustee answers is sufficient. *Foster* v. *Sinkler*, 4 Mass. R. 450; *Dix* v. *Cobb*, 4 Mass. R. 508. A negotiable note may be assigned

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by delivery, without any indorsement or other writing, and *a fortiori*, a note not negotiable. *Jones* v. *Witter*, 13 Mass. R. 304.

Tufts, for the plaintiff. The remedy provided by the statute of 1817, is not applicable to this case, because the trustee's answer does not show any assignment of the debt. In order to entitle the assignee to the benefit of the statute, he should have offered the trustee some evidence of the assignment. *Foster* v. *Sinkler*, 4 Mass. R. 450; *Wood* v. *Partridge*, 11 Mass. R. 488; *Comstock* v. *Farnum*, 2 Mass. R.

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96. In the present case the assignee did not exhibit to the trustee any assignment, nor did he produce the note; and he has not even offered an affidavit to prove the assignment.

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PARKER C. J. delivered the opinion of the Court. We think enough was disclosed to entitle the supposed assignee of the note to a trial by jury of the validity of his assignment. The respondent disclosed, that after giving his note to Wheelock, and after service of the trustee process on the afternoon of the same day, Tourtellott informed him that the note had been assigned to him, and stated the consideration he had given for it; that Wheelock, after the service of the trustee process, also certified to him that he had assigned the note to Tourtellott for a yoke of oxen purchased of him in the manner stated by Tourtellott; and the trustee himself saw Wheelock's boy driving off the cattle which had been Tourtellott's, on the afternoon of the day on which the note bears date. We think this is *primâ facie* evidence of an assignment, which, if *bonâ fide*, would pass the equitable interest in the note to Tourtellott, notwithstanding he did not present it to the trustee when he gave him notice of the assignment; and notwithstanding the trustee had no notice until after the service of the writ upon him.

By *St.* 1817, *c.* 148, whenever any person, summoned as trustee, shall disclose an assignment to another, of goods &c. of the principal in his hands, and the plaintiff in the suit shall object that the assignment ought not to have effect to defeat his attachment, and the court shall think it just or convenient that the assignee shall become a party to the suit, the person so stated to be assignee may, for the purpose of trying the validity of his assignment, become a party &c.

It was contended by the counsel for the plaintiff, that the 473
power of the Court of Common Pleas over this subject was discretionary, and that no appeal would lie from its decision, whether the assignee shall be admitted a party or not; but we cannot think such was the intention of the legislature, especially as it is provided in the latter part of the first section of the statute, that either party may appeal from any judgment of the court as in other cases.

It was also contended, that in order to give the assignee a

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right under the statute, there must be a disclosure of an assignment perfect in its form, and one which would be valid unless fraudulent. We think the answers of the trustee in this case disclose sufficient to bring the case within the statute. He was informed by both assignee and assignor that the note had been transferred, before he was served with process; and though the notice was not given until afterwards, the assignment might be good. It seems to us to be a case in which the testimony of the debtor, who stands indifferent between the plaintiff and the assignee, would be essential to the right of the case.

The judgment of the Court of Common Pleas is reversed, and the case stands for trial here; the assignee to become a party, giving bond according to the statute.[1]

The Inhabitants of Millbury, Petitioners, &c. *versus* The Blackstone Canal Company.

A town which is obliged to maintain a highway, through which a canal has been constructed, not being the owner of the soil, is not entitled to damages under a statute providing for the assessment of damages to the owners of the land through which the canal passes.

Petition for a writ of *certiorari* to the County Commissioners. The petition stated, that the Blackstone Canal Company have located and constructed a canal through and over six public highways within the limits of Millbury; that the petitioners, being injured by reason of the premises and aggrieved by the doings of the commissioners appointed for the purpose
474 of estimating all damages which any person or corporation might sustain by reason of the construction and location of the canal, presented a petition that a jury might be empannelled to assess their damages, and that the county commissioners adjudicated that the prayer of their petition ought not to be granted.

The *St.* 1822, *c.* 27, incorporating the Blackstone Canal Company, provides in § 8, that when the corporation shall have located the canal, they shall make a report to the Court

[1] See Cushing on Tr. Proc. 102, note 3. Revised Stat. *c.* 109, § 15 to 21.

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of Sessions, containing "the names of the owners of the land," and that commissioners shall estimate all such damages as they shall think any person or corporation shall sustain by the opening of the canal "through his or their land."

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Merrick, in support of the petition, contended that so far as respects this statute, the soil in the highway must be considered as owned by the town, though in respect to the original proprietor they have only an easement. The soil taken away by the respondents belonged to the petitioners; they had a right to it for the purpose of amending the highway. They became liable to maintain six bridges over the canal, and they think themselves entitled to remuneration.

J. Davis and *Allen*, *contrà*. The town have no land in the highway; the claim for damages should have been made by the owner of the soil.

The inhabitants of the town have not the easement; it belongs to the Commonwealth; and the remedy for an injury to a highway is an indictment at the suit of the Commonwealth. Bac. Abr. *Highways*, *B*; 2 Bl. Com. 35; *Spear* v. *Bicknell*, 5 Mass. R. 125; *Strout* v. *Berry*, 7 Mass. R. 385.

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Per Curiam. The town not being owners of the land under the highway,[1] and through which the canal passes, are not entitled to any damages.

Petition dismissed: costs for the respondents.

[1] See *Tyler* v. *Hammond*, 11 Pick. 214; *United States* v. *Harris*, 1 Sumner, 37; 3 Kent, (3d ed.) 432, 433; *Adams* v. *Emerson*, 6 Pick. 57.

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JONATHAN DAVIS *versus* DAVID ESTEY *et al.*, Administrators.

Where an original administration is granted in another of the United States, and an ancillary administration, in this State, and the estate is insolvent, a creditor in this State is entitled to a *pro ratâ* dividend only, although the assets in this State are sufficient to pay his demand in full.

Where an original administration was granted in another State, and a commission of insolvency was issued, of which no notice was given to a creditor in this State until after the commission was closed, and ancillary administration was granted here, but no commission of insolvency was issued, and the creditor brought an action against the ancillary administrator, it was ordered that he should recover a judgment for his whole debt, upon which he would be entitled to a *pro ratâ* dividend, but that no execution should issue.

UPON a case stated it appeared, that this action was brought to recover the amount due on a promissory note, made by David Hicks, the defendants' intestate. Hicks, at the time of his death, resided in Vermont, where administration was granted to the defendants. They represented the estate to be insolvent, on January 4, 1827; and commissioners were appointed, agreeably to the laws of Vermont, for the purpose of adjusting the claims of the creditors. The commissioners gave due notice, received the claims of creditors, and made a return of their commission, with a list of the claims allowed by them. The amount of the claims allowed by the judge of probate in Vermont exceeded the value of the real and personal estate of the intestate. No notice of the issuing of the commission was given to the plaintiff, either personally or by advertising in this Commonwealth, till after the commission was closed; and his claim was not presented to the commissioners or allowed by the judge of probate. The intestate was the owner of real estate in this Commonwealth. The administrators took out letters of administration here, and obtained license to sell the real estate for the payment of the debts. No commission of insolvency was issued here and the property here was sufficient to pay the demand of the plaintiff in full. Notice of the plaintiff's claims was given to the administrators, before the assets in this Commonwealth were withdrawn therefrom.

Oct. 3d *J. Davis* and *Allen*, for the defendants, cited *Dawes* v. *Head*, 3 Pick. 128.

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Davis v. Estey. Oct. 6th.

Barton, for the plaintiff, said, that the plaintiff claimed only a *pro rata* dividend, out of the property of the intestate.

Per Curiam. The property received in Vermont by the administrators is to be accounted for there; but the property in this Commonwealth is liable, to a certain extent, to the debts here. As the estate is insolvent, a creditor here is not to be paid his whole debt to the prejudice of creditors in Vermont, but only a *pro ratâ* dividend. There is no difficulty in this case as to the *modus operandi*. Judgment is to be taken for the whole debt, but no execution is to issue. The administrators will ascertain the amount of the assets and debts in both States, and pay the creditors here, *pro ratâ*. They will be protected in Vermont for what they are compelled to do here by our law.[1]

The Inhabitants of WARD *versus* The Inhabitants of OXFORD.

In an action brought by the town of W against the town of O, for expenses incurred in the support of a pauper, on the question whether the pauper derived a settlement in O from his grandfather through his father, it was *held*, that copies of a deed, executed by the grandfather in 1754, in which he was described as being of O, and of his last will, made in 1758, in which he was described as "now resident in O," were admissible evidence to prove that the grandfather gained a settlement in O, under *Prov. St.* 12 & 13 *Will.* 3, *c.* 10.

Held, also, that evidence proving that the grandfather, for a long time before 1754, had a settlement in the town of S, and that afterward, for years previous to 1784, the father of the pauper was supported as a pauper by S, was admissible to rebut the presumption arising from the description of the grandfather in the deed and will.

THIS was an action brought to recover the expenses incurred in the support of Abner Putnam and his family, paupers, whose settlement was alleged to be in Oxford. At the trial, in the Common Pleas before *Strong* J., the plaintiffs contended that

[1] Provision is made for such a case by the Revised Stat. *c.* 70, § 23 *et seq.* See *Porter* v. *Heydock*, 6 Vermont R. 374; *Harvey* v. *Richards*, 1 Mason, 381; *Jennison* v. *Hapgood*, 10 Pick. 77; *Miller's Estate*, 3 Rawle, 312; *Hooker* v. *Olmstead*, 6 Pick. 481; *Olivier* v. *Townes*, 14 Martin, 93, 99; *De Sobry* v. *De Laistre*, 5 Harr. & Johns. 193, 224; Story's Comm. on Confl. Laws 423; 2 Kent. (3d ed.) 433, 434; *Dawes* v. *Head*, 3 Pick. (2d ed.) 144, note.

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Ward v. Oxford.

the settlement of Abner Putnam was derived from his grandfather, Elisha Putnam, through his father. In order to prove that the settlement of the grandfather was in Oxford, they offered in evidence a registry copy of a deed of land, dated September 30, 1754, executed by him, in which he was described as being of Oxford; and a copy of his last will, dated May 20, 1758, in which he was described as "now resident in Oxford."

477 The defendants objected to the admission of this evidence, but it was admitted by the judge; and it was read to the jury, as evidence of the grandfather's gaining a settlement in Oxford under *Prov. St.* 12 & 13 *Will.* 3, *c.* 10.

The defendants then offered evidence to prove that the grandfather, for a long time before the year 1754, had a legal settlement in Sutton; and that afterwards, for a series of years previous to 1784, the father was supported as a pauper by that town; but did not offer to prove that his legal settlement was in that town. But this evidence was rejected by the judge.

The jury returned a verdict for the plaintiffs. The defendants filed their exceptions to the foregoing directions of the judge.

Oct. 3d. *Barton*, for the defendants. The descriptions of the grandfather in the deed and will are mere hearsay evidence, and are not the less inadmissible because reduced to writing. 1 Phillips on Ev. 186, 195; *King* v. *Erith*, 8 East, 539; *Bartlet* v. *Delprat*, 4 Mass. R. 702; *Gray* v. *Goodrich*, 7 Johns R. 95; *Davis* v. *Wood*, 1 Wheat. 6. The words "now resident in Oxford," used in the will, indicate a temporary residence only.

J. Davis and *Allen*, for the plaintiffs, in order to show that the will and deed were admissible in evidence, cited 1 Stark. Ev. 307; *Brune* v. *Rawlings*, 7 East, 279; *Higham* v. *Ridgway*, 10 East, 109; *Doe* v. *Robson*, 15 East, 32; *Doe* v. *Pembroke*, 11 East, 504. The evidence offered by the defendants, in regard to the settlement of the grandfather in Sutton, was rightly rejected, for it has no tendency to prove that he had a settlement there, at the time when we show it to have been in Oxford. The fact of the father's subsequently receiving relief as a pauper in Sutton, is no evidence of his settlement

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there. *King* v. *Chaderton*, 2 East, 27 ; *King* v. *Chatham*, 8 East, 498.

PARKER C. J. delivered the opinion of the Court. We think the registry copy of the deed and the copy of the will were properly admitted in evidence, as facts tending to show that the residence of the grandfather was in Oxford ; from which his settlement, under the then existing pauper laws, might be inferred by the jury. We consider this species of evidence as different from the mere verbal declaration of a pauper as to his residence, which has been ruled not to be evidence. The designation of his residence in a solemn instrument, such as a deed or a will, is in the nature of a fact rather than a declaration, being made when there was no controversy, and when no possible interest could exist to give a false designation. 478

But this evidence, which is merely presumptive, being admitted, it was proper to let the other party into proof of facts and circumstances, which would have a tendency to rebut the presumption arising from it. And we consider the facts offered to be proved by the defendants, to be of this character.

The original settlement of the grandfather being in Sutton, his temporary residence in Oxford was not inconsistent with it ; for he might have been in the place at both the periods mentioned in the deed and will, and yet never have gained a settlement there. He might have been warned out, or not have remained there a year at any one time.

Then the fact offered to be proved, that the father, many years afterwards, was maintained as a pauper by the town of Sutton, might furnish presumptive evidence, that the grandfather's settlement in Sutton continued and was transmitted to the father, or that the latter had gained a settlement there in his own right.

This would not be sufficient, independently, to prove his settlement in Sutton, but was admissible to contradict the inference, drawn from the presumptive evidence, that the grandfather had gained a settlement in Oxford. On this ground only, we think that the verdict must be set aside, and a new trial granted.

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MOSES HUMES *et ux. versus* MARK WOOD, Executor

A testator gave a specific and several general legacies, and devised his farm, being all his real estate, to several of his children, and afterwards by a general clause made the same children residuary legatees and devisees; his personal property was not sufficient to pay his debts and the specific legacy. *Held*, that the general legatees must lose their legacies, and that the real estate, being specifically devised, could not be sold to pay them.

THIS was an action of debt to recover a legacy of 40 dollars given to the plaintiff, Miranda Humes, by the will of her father, Thaddeus Thayer, of which the defendant is executor.

The case was submitted to the Court upon an agreed statement of facts.

The whole personal estate of the testator, exclusive of certain articles specifically bequeathed, was not sufficient to pay his debts; and a balance of more than 200 dollars was due to
479 the executor upon the settlement of his account, a part of the balance being for debts paid, and a part for the charges of administration. The real estate of the testator was valued at 5100 dollars, and in his will was devised as follows. "*Item third.* I give and devise my homestead, or the farm whereon I now live, the same being all the real estate which I am now seised and possessed of, consisting," &c. to his four sons, Silvanus, Chapin, Albert, and Joseph, and his four daughters Elzada, Almira, Milley, and Zilpha. After giving one specific and several general legacies, and among others that to the plaintiff, Miranda Humes, the residuary clause follows: — "I also give, bequeath, and devise, in common and undivided and in equal proportions, all my estate, real and personal, not herein before bequeathed and devised," to the four sons and four daughters named above.

Oct. 3d. *B. Adams*, for the plaintiffs, contended that the executor was bound to sell the real estate to pay the legacies. It was no doubt the intention of the testator that the legatees should have a portion of his estate. The devisees of the real estate can only claim as residuary devisees, and not under the specific devise, for the last provision in the will is to prevail over the previous one. He cited *Dawes* v. *Swan*, 4 Mass. R. 208; *Parsons* v. *Winslow*, 6 Mass. R. 169; *St.* 1783, *c.* 24, § 17,

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18. The assets should be marshalled, so as to have the debts paid out of the real estate, leaving the personal estate free to pay the legacies. Toller, 423.

Merrick, contrà, cited Toller, 301, 302, 339; Bac. Abr. *Legacies &c. G, H; Hern* v. *Merick*, 2 Salk. 416; *Kightley* v. *Kightley*, 2 Ves. jun. 328; *Keeling* v. *Brown*, 5 Ves. 359; *Lupton* v. *Lupton*, 2 Johns. Ch. R. 614.

PARKER C. J. delivered the opinion of the Court. The action cannot be maintained against the executor, because he has no funds out of which to pay the legacy. The personal estate is all consumed by debts and expenses of administration, except the stock, farming utensils, &c. which are specifically devised. The real estate is not charged with the payment of legacies, and besides is also specifically devised. It does not come into the hands of the executor, and he has no authority to sell it. That a devise of a farm or any definite parcel of real estate may be specific, the authorities cited sufficiently show. *Oct. 6th* **480**

It was supposed by the counsel for the plaintiffs, that there being a general residuary devise to those to whom the real estate is given in a preceding clause, this operates as a revocation of the particular devise. But it cannot so operate contrary to the clear intention of the testator, which was, in this residuary clause, to give what might by possibility not have been before disposed of.

Plaintiffs nonsuit.

STILLMAN FITCH *et al. versus* BUSH FITCH.

A covenant by an heir expectant, that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor.

THIS was an action of covenant broken, brought upon a deed made by the defendant on the 3d of May, 1825.

In this deed the defendant says, "I, Bush Fitch, in consideration of 1400 dollars paid me by Stillman Fitch and George Fitch, (the plaintiffs,) my brothers, as well as for the

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purpose of enabling my father, Ebenezer Fitch, to settle his estate as far as may be, during his lifetime, among his children and heirs at law, do by these presents, for myself, my heirs, executors, &c. transfer, assign, sell and forever release and quitclaim unto the said Stillman and George, their heirs, &c. all the right, title, interest, claim and demand which I now have or can have hereafter, either by will or descent or otherwise, in or to the estate of my father, either real or personal. To have and to hold to the said Stillman and George, their heirs, &c. to them and their use forever. And I do for myself, &c. covenant with the said Stillman and George, their heirs, &c. that I will not at any time claim, demand or receive any share or portion or part out of my father's estate, and that I will, &c. on demand of the said Stillman and George, &c.
481 and at their expense, execute and deliver to them, &c. all such deeds, power of attorney or other such proper instrument as may be necessary and adapted to enable them to receive the full benefit of this deed according to the true intent and meaning thereof."

The declaration sets forth the substance of the deed, and avers that Ebenezer Fitch died in January, 1826, leaving a will and codicils, which were duly proved in May, 1826. by which the testator, after making divers devises and bequests, gave the residue of his estate, real and personal, to his sons, Ebenezer, William, Bush and Achley, and to their heirs, to be equally divided between them; that this residue included certain tracts of land specified in the declaration, of the value of 4000 dollars; that it was necessary, to enable the plaintiffs to receive the full benefit of the deed, that the defendant should execute and deliver to them a deed of all his interest, right and title in and unto these tracts of land; and that on March 6, 1827, they demanded of the defendant, that he should execute and deliver to them, and at their expense, a deed of all his interest, right and title in the tracts of land above mentioned, but that he had refused.

The defendant, after oyer of the deed, pleads that no such demand was made before the action was commenced; and issue was taken upon that fact.

At the trial, before *Parker* C. J., at April term 1828, the

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plaintiffs offered certain depositions in evidence, to prove a demand; whereupon the defendant consented to be defaulted, with liberty to move that the default be taken off and that the plaintiffs be nonsuited, in case there was not sufficient evidence in the depositions, of an actual demand, or of a waiver of a demand; otherwise the default was to stand and a hearing in chancery to be had; unless the Court should be of opinion that the contract and covenants on which the action was brought, were sufficient to entitle the plaintiffs to recover.

The case came before the Court at September term 1828, when it was intimated by the plaintiffs, that the contract was made with the consent of Ebenezer Fitch, the father of the parties; though this fact was not alleged in the declaration. The Court said, that as one objection against contracts of this kind is, that they are productive of imposition upon the ancestor, the fact stated might be material. Whereupon the plaintiffs, upon leave obtained, amended their declaration by adding an averment, that the deed was made, executed and delivered with the knowledge and by the consent of Ebenezer Fitch; and to the declaration so amended the defendant demurred generally.

Merrick, in support of the demurrer. No title passed by the deed, the defendant having no estate in the land. A grant of a mere possibility is void. *Davis* v. *Hayden*, 9 Mass. R. 514; Bac. Abr. *Grant*, *D* 3; Com. Dig. *Grant*, *D*, and *Assignment*, *C* 3; Shep. Touch. 239; *Jones* v. *Roe*, 3 T. R. 93; 2 Mad. Ch. Pr. 549, cites *Carleton* v. *Leighton*, 3 Meriv. 667. A title will enure by estoppel, only where public policy or some positive law does not interfere. *Somes* v. *Skinner*, 3 Pick. 52; *Brinley* v. *Whiting*, 5 Pick. 348. Here public policy does interfere and avoid the deed. The only difference between this case and that of *Boynton* v. *Hubbard*, 7 Mass. R. 112, is, that here the father knew of the contract, so that no fraud was practised upon him; but still the deed is against public policy. Immediately after this bargain was made, the father might have cut the defendant off with a shilling; so that a way was opened for the commission of fraud. There was no rule for estimating the value of the property which the father might leave to the defendant; it was

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wholly uncertain whether he would die testate or intestate, or whether he might not lose his property before his death; the contract, therefore, was a desperate wager, which the Court will not enforce. *Amory* v. *Gilman*, 2 Mass. R. 1. It is believed that no decision of any common law court can be found, in favor of such a contract as the present; and in the two cases in chancery, of *Beckley* v. *Newland*, 2 P. Wms. 182, and *Hobson* v. *Trevor*, ibid. 192, the reasons are not satisfactory. Heirs are relieved in chancery against such contracts. 1 Madd. Ch. Pr. (Hartford edit.) 117.

If the contract is not void, then because it is valid this action cannot be sustained, for according to *Somes* v. *Skinner*, 3 Pick. 52, the title is already vested in the plaintiffs.

483 *Newton, contrà*, contended that the deed was not against public policy; and he referred to 1 Madd. Ch. Pr. (Hartford edit.) 408, 409; *Musprat* v. *Gordon*, 1 Anstr. 34; *Hobson* v. *Trevor* and *Beckley* v. *Newland*, before cited; *Lloyd* v. *Johnes*, 9 Ves. 52.

March term 1830, *in Suffolk.*

PARKER C. J. drew up the opinion of the Court. As the declaration now stands, as amended, we do not think it bad on demurrer. Though no title passed by the deed made in the lifetime of the father, there being nothing then to grant,[1] yet the covenant to make further assurances may be valid, if made on good consideration, without any oppression or advantage taken of the heir expectant, and with the knowledge and consent of the father. In such case, there is no fraud upon him, no imposition upon the heir who covenants, and no injury to the public; which are the grounds on which such contracts are set aside in chancery.

Here a full and adequate consideration was paid to the defendant, who was desirous of receiving the value of that portion of his father's estate, which in the course of law would fall to him. With this, he goes abroad to enter upon business, with a money capital. The father, acquiescing in his wishes, assents to the purchase made by two other sons, thinking this the best mode of providing for the immediate wants of the son who is to leave the paternal roof and seek his fortune else-

[1] See *Somes* v. *Skinner*, 3 Pick. (2d ed.) 598, note.

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where. There seems to be nothing against good policy in this; and it is not opposed by any case that has been cited. On the contrary, it is clearly within the principles of the case of *Boynton* v. *Hubbard*, 7 Mass. R. 112; in which this subject was fully and ably considered. We deem the allegation of the knowledge of the father, and his consent to the transaction, essential to the validity of the declaration. Fitch v. Fitch.

Our judgment is, that the declaration, as amended, is good, and that the defendant may be heard in chancery as to the damages, unless he wishes to contest the consent of the father, or would allege fraud or imposition in obtaining the contract; in which case he may replead.[2]

ERASTUS HIGBEE *et al.* Appellants, *versus* ENOCH BACON, Administrator. 484

If an administrator, in his answer to interrogatories proposed to him in the Court of Probate touching his account, makes an admission tending to charge himself with any estate omitted in his account, and at the same time states a fact in his discharge, such statement must be rejected as irrelevant, unless supported by proof.

The party at whose instance interrogatories have been proposed, in the Court of Probate, to an administrator touching his account, has a right to offer evidence to disprove his answers.

ENOCH BACON having rendered in the Probate Court his second account as administrator of the estate of his father, Ephraim Bacon, the appellants, heirs at law of Ephraim, filed a complaint, stating that they suspect the administrator has concealed and embezzled moneys, goods and chattels belonging to the estate of the intestate, and especially that he conceals and refuses to account for a certain instrument whereby he was bound to pay to the intestate certain large sums of money, and upon which, at the time of the intestate's decease, large arrearages were due and unpaid, and still remain unpaid and unaccounted for; and the appellants pray that the administrator may be cited to produce the instrument and submit himself to

[2] See 1 Story's Comm. on Equity, 334 *et seq*, and cases cited in notes.

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an examination upon oath, touching the matters contained in the complaint.

The administrator having appeared to make answer to the complaint, the following interrogatories were proposed to him:—

Did your father, at any time during his life, hold a bond, lease or other instrument or obligation whereby you promised or undertook to pay him any sum or sums of money?

Were any of said instruments under seal; if so, how many, and what were they; and if any such sealed instruments were held by your father during his life, did you take them into your possession after his decease?

The administrator produced an indenture of lease, dated April 1, 1806, by which, for the consideration of 1560 dollars, he demises the farm, on which he then lived, to his father for life, and agrees to carry on the farm at his own expense, and to pay his father 50 dollars yearly during his father's life, and to
485 pay the taxes. In answer to the complaint and to the interrogatories, the administrator stated, that previous to April 1, 1806, he had labored for his father for about sixteen years, for most of which time he claimed compensation; that on that day he received from his father a deed, dated June 23, 1792, given by J. Bates to him (the respondent), and which he understood was procured by his father's giving up a deed formerly given to him (the father) by Bates, bearing the same date; that he believed, and he has no doubt his father believed, that the amount due to the respondent and the sum which the respondent then secured and afterwards paid to his father, were a full equivalent to the interest which his father had in the farm; that at the time of receiving the deed, the respondent delivered to his father the instrument above set forth; that no consideration ever passed to him from his father, for the giving of this instrument, nor did the respondent ever expect to pay the sums therein mentioned; that the instrument remained in his father's hands until his decease in August, 1825, (when it came into the respondent's hands,) without any demand or request on the respondent for the payment of any thing thereon; but on the contrary, his father repeatedly told him, that he (the father) never should claim of the respondent any payment on the in-

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strument, and that the services which the respondent had rendered him and was from time to time rendering him, were a full equivalent to all the sums which he might or could demand by virtue of the instrument, and that he considered the instrument to be fully settled and paid by these services; that the respondent fully believed that the services which he rendered to his father, from the date of the instrument to the time of his decease, were of more value to him and more injurious to the respondent, than the payment of the 50 dollars would have been. He further stated, that the instrument was handed to him by S. Fiske, one of the executors named in the will of Ephraim Bacon, (which was not proved and allowed,) and that it came into his possession with other papers of the deceased.

The complainants, reserving all manner of advantage of exception to the insufficiencies and impertinence of the answer, for replication say, that they will aver and prove their bill and complaint to be true, certain and sufficient in law to be answered to, and that the answer is uncertain, untrue and insuffi- 486
cient to be replied to, without that, that any other matter or thing whatsoever in the answer contained, material or effectual in the law to be replied unto, or to be confessed and avoided, traversed or denied, is true.

The Court of Probate allowed the administrator's account, and adjudged that he should be discharged and not held for any thing which might be supposed due to the estate of the intestate on the lease above mentioned. The court further adjudged, that no collateral evidence ought to be admitted to contradict the answers of the administrator.

The complainants appealed from this decree, for several reasons.

1. Because the judge of probate refused to strike out from the answer of the administrator certain matters not relevant to any interrogatory put by the complainants, but altogether irrelevant, impertinent and improper.

2. Because the administrator was not required to prove the truth of certain allegations by him made in his answer, whereby he attempts to discharge himself from the payment of the obligation purporting a lease, although these allegations were denied by the complainants to be true.

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3. Because the complainants were not permitted to produce any evidence to contradict or explain divers allegations contained in the answer, though they offered so to do.

4. Because the judge decided that the answer was sufficient in law and conclusive to discharge the respondent from any liability as administrator, upon the obligation above mentioned.

5. Because the judge refused to admit evidence to charge the administrator for goods, effects, credits or assets not credited in his second administration account, which was open and pending before the judge.

Oct. 5th. *J. Davis* and *Tufts*, for the appellants. Two points are decided by the judge of probate; first, that the answer of the administrator discharged him from liability upon the instrument produced; and secondly, that no evidence was admissible to impeach his answer. In both respects the decree is erroneous.

The complaint had a two-fold object; — that the administrator should produce the lease, and that he should answer as to
487 other property. In respect to the lease, the complaint is like a bill in chancery to produce papers. Com. Dig. *Chancery*, 3 *B* 1, 3 *I* 1. The administrator was called on simply to produce the lease; which it was incumbent on him to do, in order that the appellants might be in as good a situation as before he was appointed administrator. He produces the lease and swears that he has complied with its terms. We contend that he is not to use his own statement in discharge of himself, and that it ought to be struck out of his answer, as irrelevant and improper.

But if the answer is to stand, it is not sufficient to discharge the administrator. Where a defendant, in his answer, admits his liability and sets forth also some fact to discharge himself, he is bound by his admission, but he must prove the fact alleged in his discharge. Blake's Ch. Pract. 247; *Hart* v. *Ten Eyck*, 2 Johns. Ch. Rep. 87.

The judge of probate erred likewise, in determining that the appellants should not offer evidence to disprove the statements in the answer. It has always been the usage to litigate an administrator's account, although he shall have sworn to its correctness. His oath is not conclusive. Toller, (3d ed.) 492, cites 4 Burn's Eccles. Law, 427; *Selectmen of Boston*

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v. *Boylston*, 4 Mass. R. 318. On a bill of discovery in chancery, the plaintiff may offer evidence to disprove the answer. Whether this complaint is considered like a bill of discovery, or as auxiliary to the proceedings in the probate court, it may be contradicted.

The object of the appellee is to drive the appellants to their remedy upon the probate bond, hoping that in such case they will be obliged to use the whole of his answer; but though the appellants would probably find no great difficulty in maintaining a suit on the bond, yet it is apprehended that substantial justice may be done by requiring the administrator to prove in the Court of Probate, that he has paid all sums due upon the instrument in question.

Newton, for the appellee. To what extent and in what manner the judge of probate shall proceed in interrogating an administrator in regard to the settlement of his accounts, has not been determined; whether he is invested with only the power of spiritual courts; or whether he is to proceed like a court of equity on a bill against an executor to account, or like a court of equity upon a bill of discovery; or whether he has power to proceed in all these three ways. In the spiritual courts, if the administrator is examined on oath touching the inventory, no evidence is admissible to contradict his answer. Toller, 253. There is no good reason for supposing that the legislature intended to give the judge of probate all the powers of a court of equity, in relation to the examination of an administrator; and in a court of equity, if the complainant makes the administrator his witness, the whole answer must be taken together. This complaint cannot be likened to a bill of discovery, for that is used only in aid of another suit; but here the object seems to be to charge the administrator. 1 Madd. Ch. Pr. 196. To effect the object of the complainants, the Court of Probate must unite in itself the powers of spiritual courts and courts of chancery, in the three modes of proceeding before mentioned. But it is apprehended that only the powers of spiritual courts were intended to be conferred on the judge of probate.

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This complaint must be founded upon *St.* 1783, *c.* 32, § 11; but this statute does not provide for the examination of an

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executor or administrator, but only of other persons who are supposed to have concealed or embezzled effects of the deceased. *Selectmen of Boston* v. *Boylston*, 4 Mass. R. 318. If the heirs can file such a complaint against the administrator, it must be in the nature of a bill of discovery, and then his answer cannot be contradicted.

The answer contains nothing irrelevant or impertinent. If the administrator had simply produced the paper, he would have made himself liable upon it; it was therefore proper for him to state all the circumstances, whereby it would appear that he was not chargeable.

March 26th, 1830, in Suffolk.

PARKER C. J. drew up the opinion of the Court. We think the proceedings of the judge of probate in this case were incorrect, and that his decree allowing the second account of administration must be reversed. It was heretofore determined, that the administrator was obliged to answer under oath touching any matters relating to his account and tending to charge him with any estate or effects which he may have

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omitted either by mistake or design. Without this power he may defraud the heirs or creditors without any opportunity to detect him. As in the present case; there was an obligation from him to his father, found uncancelled among the papers of the deceased, which came to his hands as administrator. He might have burnt or otherwise have destroyed it, and there might be no proof that it was ever in existence. Merely swearing to his account gives little security, without the authority in the judge of probate, at the instance of those interested in the estate, to examine him critically under the sanction of his oath. It was objected on a former hearing, that it is contrary to justice and to the principles of the constitution, to subject a party to such an inquisitorial power, and by means of it to make him furnish evidence against himself. But the same objection will lie to the trustee process and to bills in equity, which require answers under oath. It should be recollected that an administrator is a trustee, accepting the trust voluntarily, and so having no right to complain of the liabilities incident to the trust. Such has been the practice in the Probate Courts, and it has been sanctioned by this Court in the case of *Selectmen of Boston* v. *Boylston*, 4 Mass. R. 318, and *Stearns* v.

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Stearns, 1 Pick. 157.[1] But it certainly does not follow, that because he may be so examined, he will have a right to discharge himself by his own statement and declaration, unaccompanied by any evidence.

The rule is, that any answer that is within the proper scope and limits of the question put to him, shall be available in his favor; as in confessions in suits at common law, the whole shall be taken together, not as conclusive, but as evidence for the consideration of the jury. But because he is put upon interrogatories, to allow him the general liberty of avoiding the effect of his admissions by going into independent matter, without any proof to support it, would be often to render this mode of inquiry wholly ineffectual for the purposes for which it was instituted. We think the judge ought to have rejected the irrelevant matter if not supported by proof, and that the appellants ought to have been allowed to contradict his statement by evidence; and because this was refused, the decree is reversed and the case remitted to the judge of probate for further proceedings.

EBENEZER W. CUTLER *versus* GILBERT W. HAVEN. 490

A note, and a mortgage deed given to secure it, were handed, with other effects, by A, the administrator of the mortgagee, to B, the guardian of the mortgagee's heirs, on a settlement, as their property, but the note was not indorsed, and no assignment in writing was made of the mortgage, but a power of attorney was given to B to act in the name of A. This power was not recorded. It was *held*, that the mortgager or his assigns, if acquainted with the equitable assignment, had no right to tender or pay the mortgage money to A, if such tender or payment was made with a design to injure B and the heirs; and that a discharge of the mortgage made by A would not defeat the rights of B.

It seems, that the payment should be made to B, and that he might discharge the mortgage by cancelling the deed and giving up the note.

The expression "power of attorney" implies a power under seal.

THIS case was assumpsit for use and occupation, and was tried before *Cummins* J. of the C. C. P. on the general issue.

The plaintiff gave in evidence a mortgage deed of the land from G. Brown, and proved that on May 9, 1825, he entered

[1] See Revised Stat. *c.* 67, § 7

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for condition broken, and that after the discharge of a prior mortgage on the same estate, which discharge was made by Samuel Haven, administrator, as hereinafter mentioned, notice was given to the defendant to pay the rent to the plaintiff.

The defendant proved that he occupied the estate under a lease for years from Joseph Valentine. He also proved that Brown, prior to the mortgage to the plaintiff, mortgaged the estate to Samuel Haven junior, and that Brown's equity of redemption was sold on execution, and was purchased by and duly conveyed to Haven junior.

The defendant also offered evidence to show, that Haven junior having died, administration on his estate was granted to Samuel Haven and V. Hemmenway: That in 1818 they settled their final account in the probate office, and paid over the effects in their hands to Valentine, who was guardian of all the heirs of Haven junior, except one who was under the guardianship of Samuel Haven: That the administrators, in making payment to Valentine, passed into his hands divers promissory notes due to the intestate's estate, and among them the note of Brown secured by the mortgage, and also the mortgage deed. But it appeared that the notes were not indorsed, and the mortgage was not assigned by any written instrument. The administrators, however, at the time, gave Valentine a power
191 of attorney to act in their names, in order to enable him to realize the full benefit of the effects put into his hands.

A few months after the plaintiff had taken possession of the land, Valentine entered on and took possession of it by virtue of his power of attorney, for breach of the condition of the mortgage to Haven junior. And Valentine subsequently made the lease of the land to the defendant, by virtue of a power of attorney from all the heirs of Haven junior, they having become of full age.

The plaintiff proved a tender to Samuel Haven, as surviving administrator (Hemmenway having deceased), of all the money due on the mortgage to Haven junior, and a discharge of the mortgage in the registry of deeds, dated January 19, 1827, by Samuel Haven, as surviving administrator.

This discharge was attempted to be impeached on the ground that it was fraudulently obtained by the plaintiff, with intent to

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injure Valentine. And the defendant offered evidence to show that the plaintiff was well acquainted with Valentine's claims and rights, and that he paid Samuel Haven a less sum than was due on the mortgage; but the plaintiff offered evidence which tended to prove that the amount deducted from the sum due on the mortgage was on account of a claim which the plaintiff made against one of the heirs of Haven junior, and which was allowed by the administrator.

The judge instructed the jury, that the acts done by the administrators were insufficient to pass or transfer to Valentine any legal interest in Brown's mortgage to their intestate; and that the legal estate remained in the administrators, and the survivor of them; and that on January 19, 1827, Samuel Haven, the surviving administrator, was the only person who had power to discharge the mortgage, and the tender or payment of the money due thereon was rightly made to him, and that he had a right to receive the money and discharge the mortgage, and that if the plaintiff had acted otherwise, he could not have protected his own interest in the mortgaged premises.

The judge also instructed the jury, that as the legal estate in the mortgaged property was in Samuel Haven, as surviving administrator, if the discharge made by him was obtained by the plaintiff fairly and without fraud done or intended towards Samuel Haven, it was valid in law, notwithstanding the plaintiff might have intended thereby to defeat Valentine's equitable interest in the mortgaged property, and although Valentine had thereby been defrauded of his interest in it, and notwithstanding the plaintiff, having a full knowledge of the transactions between Valentine and the administrators, and of Valentine's claims, procured the discharge of the mortgage by paying Haven a less sum than the plaintiff knew was due on it. 492

To these opinions of the Court, the counsel for the defendant excepted.

Merrick, in support of the exceptions. The note having been assigned by the administrators of the promisee, could not be defeated by them. *Jones* v. *Witter*, 13 Mass. R. 304; *Dunn* v. *Snell*, 15 Mass. R. 581. Valentine, then, having an absolute right in the note, was vested by his power of attorney with a right to enter on the mortgaged land; and this power, Oct. 5th

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being coupled with an interest, was irrevocable. Com. Dig. *Poiar, A; Osgood* v. *Franklin*, 2 Johns. Ch. R. 1. The tender should have been made to Valentine, and if Haven, the surviving administrator, on being notified, had refused to release, it would have been a good cause for a bill in equity. The administrator, by his fraudulent release, could not cut off his assignee from his rights. *Brown* v. *Maine Bank*, 11 Mass. R. 153.

Newton and *Lincoln*, *contrà*. The transactions between Valentine and the administrators did not transfer the legal estate in the mortgaged land to him; it still remained in the administrators. *Parsons* v. *Welles*, 17 Mass. R. 425; *Warden* v. *Adams*, 15 Mass. R. 233; *Scott* v. *M'Farland*, 13 Mass. R. 309. The power of attorney given to Valentine cannot affect the case, as it was not produced at the trial, and it does not appear that it was under seal. Besides, the power, not being recorded, could not operate as a notice to the plaintiff of Valentine's claim. *Taylor* v. *M'Donald*, 2 Bibb, 420; *Dunham* v. *Dey*, 15 Johns. R. 555; *Johnson* v. *Stagg*, 2 Johns. R. 510; *Chandos* v. *Brownlow*, 2 Ridgway, 422, cited in Pow. on Mort. 631; *Phillips* v. *Redhill*, cited in *Hitchcox* v. *Sedgwick*, 2 Vern. 160. The tender was properly made to the administrator, notwithstanding the equitable interest of the heirs whom Valentine represented. *Scott* v. *M'Farland*, 13 Mass.

493 R. 309; *St.* 1788, *c.* 51; 1 Pow. 214. Haven, the administrator, was the only person of record who could discharge the mortgage; it would be unreasonable to hold the plaintiff bound to find out who were equitably interested. The plaintiff was bound to pay Haven, in order to protect himself. Whatever the transactions between the plaintiff and Haven were, the heirs are not injured, for they have a remedy on the administration bond. Even if the plaintiff knew of Valentine's equitable claim, he was not bound to look after the appropriation of the money by the administrator. 1 Pow. on Mort. by Rand, 219. The burden of proof is on the defendant. 2 Pow. on Mort. 631.

March term 1830, in Suffolk.

PARKER C. J. afterward drew up the opinion of the Court. A new trial is granted in this case, on account of a misdirection of the judge in his charge to the jury. Notwithstanding there was no legal assignment of the mortgage deed by the admnis-

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trators of Haven junior to Valentine as guardian to the children of Haven junior, there was, by the delivery of the deed and the note collateral to it, with a power of attorney to enable him to enforce the payment of the debt, an equitable interest in Valentine, which could not be defeated by any fraudulent transaction between the plaintiff and the surviving administrator. That the payment to that administrator, and his discharge of the mortgage on the record, were fraudulent against Valentine and his wards, cannot admit of a doubt, if Cutler knew of the possession of the deed and note by Valentine, and the purposes for which they were placed in his hands; and it was this knowledge which was proposed to be proved by the defendant; but permission to do it was refused by the judge, on the ground, that if Haven, the administrator, was not defrauded, the transaction was legal. But Valentine, the guardian, was the only person who could be defrauded. The money belonged to him in trust for his wards, and the payment, if made to the administrator, should not have been made without notice to Valentine and his consent thereto. It is said that Valentine could not have received the money, and could not have discharged the mortgage. But we think that, holding the mortgage deed and the power of attorney, he might have received the debt and delivered up the note and cancelled the mortgage.[1]

It is suggested that the power of attorney might not have been by deed, and was not recorded. But the very terms *power of attorney* import a deed,[1] unless the contrary is shown, 494
and the knowledge of the plaintiff superseded the necessity of a registry.

Supposing the facts stated and offered to be proved, to be true, there was unquestionably collusion between the plaintiff and Haven, the administrator, which prevents any legal effect of the transaction, to the prejudice of the heirs of Haven junior. If the payment and discharge are held valid, then a most gross fraud is practised, and if the heirs should seek their remedy against the administrator and his sureties, upon the bond, the sureties would suffer by that fraud. It is more conformable

[1] See 1 United States Dig. *tit. Assignment, ch.* III. & IV.; *Southerin* v. *Mendum*, 5 N. Hamp. R. 430.

[1] See Story's Comm. on Agency, 3.

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therefore to justice, that the payment should be held void as against Valentine, and the mortgage still in force; and then, if the money paid to the administrator is lost, the loss will fall upon him who ought to bear it. The defendant therefore would continue the lessee of Valentine, the entry upon him would be void, and so the action for rent would not be maintained.

A new trial is therefore granted.

David Baldwin *versus* The Inhabitants of the First Parish in Fitchburg.

The personal property of a minor who attends public worship in a different parish from his guardian, is nevertheless to be taxed to the guardian in the parish of which he is a member.

Assumpsit for money had and received.

The parties agreed upon the following facts. In 1828, the First Parish in Fitchburg voted to raise the sum of 600 dollars as a parish tax. The sum of 5 dollars 28 cents was assessed upon the plaintiff for certain personal property which he held as guardian of Abel and George Farwell, minor children of Daniel Farwell deceased, and was collected by a distress of his own property, and received into the parish treasury. At this time, and long before, the plaintiff was a regular member of the Second Parish in Fitchburg. At the time of the decease of Daniel Farwell there was but one religious society in Fitchburg, to which he then belonged, except a Baptist society, which was incorporated in 1810 and has been in existence to this time.

495 In 1820, when the plaintiff was appointed guardian, he was a member of the same religious society to which Daniel Farwell belonged at the time of his decease, and which was of different religious sentiments from the First Parish, the defendants. In 1823 the Second Parish was formed; of which the plaintiff became a member in 1824. One of the minors, from the time of his father's death to the time of the assessment of the tax, was a member of his mother's family. She had married a second husband, a member of the First Parish, and with this fam-

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ily the minor regularly attended public worship in the First Parish, he being continued in this family, under the agreement of the plaintiff, at a stipulated price. Neither of the minors has ever resided in the family of the plaintiff, but they have been under his direction and control.

Strong, Justice of the Court of Common Pleas, was of opinion that the First Parish had a legal right to tax the plaintiff as guardian, and he ordered judgment to be entered for the defendants; to which opinion and order the plaintiff filed exceptions.

J. Davis supported the exceptions. The defendants admit that the guardian is the person to be taxed; *Payson* v. *Tufts*, 13 Mass. R. 493; and the plaintiff contends that the property follows the guardian. The liability to be taxed depends on membership; and *that* the guardian is to determine. He is *in loco parentis*; he is trustee both of the person and of the estate of his ward. Reeve's Dom. Rel. 327; Bingham on Infancy, 168. The *St.* 1823, *c.* 106, in authorizing persons to separate themselves from one religious society and become members of another, did not intend to include minors; who are incapable of making a contract. Neither does this case come within the provision, that any person who may come to dwell in any town, shall be taken to be a member of the oldest religious society in the town, unless he shall file a certificate that he has joined some other religious society. When a man dies, his membership ceases, and his children, if of age, choose for themselves their place of worship, and if under age, their guardian determines to what society he will pay their taxes. *Oct. 5th.*

Merrick, for the defendants. By *St.* 1786, *c.* 10, § 3, a parish is authorized to grant money for parochial purposes, to be assessed on the polls and property within the parish. In the lifetime of the father, these minors belonged with him to the First Parish in Fitchburg; and as the guardian has filed no certificate pursuant to the statute of 1823, their relation to that parish remains unchanged. 496

The opinion of the Court was afterwards drawn up by

PARKER C. J. The general question is, whether the personal property of minors, who are under guardianship, is liable to taxation in the parish of which their father was a member *March 26th, 1830, in Suffolk*

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Baldwin v. First Par. in Fitchburg.

when he died and within the bounds of which they continue to reside with their mother, or in another parish, in the same town, of which the guardian is an inhabitant and member And we are clearly of opinion that such property is to be taxed to the guardian by the parish within which he dwells and of which is a member. That it is to be taxed to the guardian and not to the minor, or at least that it may be properly taxed to the guardian, is settled in the case of *Payson* v. *Tufts*, 13 Mass. R. 492. And that the parish to which the guardian belongs has a right to the tax, follows from the provisions of *St* 1786, *c.* 10, § 3.

The personal property of minors must be presumed to be in the actual custody or under the control of the guardian, and is therefore in the parish where he dwells. We do not find that any subsequent statute has expressly or by implication repealed this, those which provide for a removal from one parish or religious society to another having no bearing on the question. The minors cannot be members of any parish, in the sense of the law, in regard to taxation, having no voice in parish affairs, and though they may attend public worship in a different parish from their guardian, still their personal property is not there, nor are they to be taxed on account of it.[1]

Judgment of Court of Common Pleas reversed.

[1] See Revised Stat. *c.* 7, § 6, 10.

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AARON BROOKS Junior *versus* PETER HARWOOD *et al.*

Two parcels of land, in which S is entitled to dower, are mortgaged together as security for a debt. Afterward the mortgager conveys all his interest in one parcel to A. H. and in consideration of S's joining in the conveyance and releasing her right of dower, he conveys to her an estate for her life in the other parcel, upon which parcel she enters and takes the profits. The plaintiff purchases the mortgager's right to redeem this second parcel. P. H. having purchased A. H.'s interest in the first parcel, takes an assignment of the mortgage, and enters upon the mortgaged premises for foreclosure. On a bill in equity by the plaintiff to redeem, it was *held*, that S was not liable to contribute towards the redemption, nor to account for the profits of the second parcel, the lease for life having been made to her as an equivalent to her right of dower in both parcels.

Held, also, that as the assignee of the mortgage could not have compelled S to pay over the rents and profits of the second parcel, without subjecting himself to her claim of dower in the whole land, he was not bound to account for them in this suit; and that the plaintiff had no equitable claim to them, as he purchased after the lease for life, and consequently at a reduced price on that account.

Held, also, that the assignee of the mortgage was bound to account for the rents and profits of the first parcel, from the time of his entry for foreclosure.

Held, also, that the plaintiff, upon paying the whole mortgage debt, deducting the rents and profits last mentioned, would be entitled to hold the whole estate mortgaged, excepting the part leased to S during her life, until he should be reimbursed the amount paid by him over his proportion of the mortgage debt.

THIS was a bill in equity to redeem certain mortgaged estate. The prayer of the bill extended to the redemption of a farm in Phillipston and other estate included in the same mortgage, but the object of the plaintiff was to redeem only the estate last mentioned.

The case was submitted on the following statement of facts.

The farm, together with the estate of which redemption is claimed, was mortgaged by Nathan Stratton to Hutchins Hapgood, February 9, 1820, to secure the payment of 1200 dollars. In these mortgaged estates, Sarah Stratton, one of the defendants, was entitled to dower.

On November 5, 1820, Nathan Stratton conveyed the farm, subject to the mortgage, to Abner Harwood, and Sarah Stratton also released her interest to Abner Harwood; and Nathan Stratton, at the same time, in consideration of this release by her, leased the other mortgaged estate to her for life; which she entered upon and has continued to occupy ever since.

On May 20, 1822, Nathan Stratton's right of redeeming the 498

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estate, which had been leased for life to Sarah Stratton, was sold on execution, and purchased by the plaintiff.

On October 23, 1823, Abner Harwood's right of redeeming the farm was sold on execution, and purchased by the defendant, Peter Harwood, for 665 dollars.

On November 3, 1823, Abner released his interest in the farm to the defendant Peter, and on December 27, 1824, Hapgood assigned his mortgage to Peter, who paid him 1416 dollars and 63 cents, being the amount then due on it.

On March 12, 1825, Peter made an entry on the mortgaged property for the purpose of foreclosure.

The farm is worth 3000 dollars, and the rents and profits of it have amounted to 150 dollars a year.

The other estate is worth 242 dollars, and the rents and profits of it have amounted to 10 dollars a year; which have been received by the defendant, Sarah Stratton.

The plaintiff, before the bill was brought, requested Peter Harwood to state an account of the rents and profits received by him, and of the sum due on the mortgage. Peter answered, that he had received no rents.

Sept. 29th. *Bigelow* and *Brooks*, for the plaintiff, contended that Peter Harwood was bound to account for the rents and profits of the farm since he entered for foreclosure; and that the rents and profits received by Sarah Stratton, the tenant for life, should be applied to keep down the interest. *Penrhyn* v. *Hughes*, 5 Ves. 99.

J. Davis, for the defendant Harwood, cited *Gibson* v. *Crehore*, 5 Pick. 146; *Saunders* v. *Frost*, ibid. 259.

Newton, for the defendant Sarah Stratton.

WILDE J. afterwards drew up the opinion of the Court. This is a bill in equity to redeem the demanded premises from a mortgage given to Hutchins Hapgood, and by him assigned to Peter Harwood, one of the defendants, he having before purchased all the mortgager's right and interest in a large portion of the lands mortgaged.

The plaintiff's right to redeem is not questioned, but the defendants deny their liability to contribute, and contend that the plaintiff is not entitled to redeem but upon payment of the

499 whole debt due on the mortgage. That Peter Harwood is not

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liable to contribution in the present suit, is fully settled by the case of *Gibson* v. *Crehore*, 5 Pick. 146. So that the only question is, whether Sarah Stratton, the other defendant, under the circumstances of the case, she having an estate for life in the demanded premises, is equitably bound to contribute towards relieving the estate from the incumbrance.

It is no doubt true generally, that a tenant for life, in possession of an estate charged with a mortgage, is bound to keep down the interest, or to assist the reversioner in redeeming the mortgage; but under all the circumstances of this case, we think that Sarah Stratton is not thus liable. She not having joined in the mortgage, would have been entitled to dower in the whole of the mortgaged premises, but for her subsequent release to Abner Harwood. In consideration of that release, the demanded premises were leased to her for life, as an equivalent for her right of dower in the whole of the mortgaged premises, and it has not been denied that it was a fair equivalent, and that the conveyance to her was made *bonâ fide*. This freehold estate was never intended to be subject to the mortgage. Abner Harwood was bound to pay the whole debt if he chose to redeem, and if he did not redeem, the mortgagee could not have defended against Sarah Stratton's claim of dower. It is clear, therefore, that she is entitled to hold the demanded premises free from the mortgage, and that Peter Harwood, after purchasing in the mortgage, could not have compelled her to pay over the rents and profits of the demanded premises, without subjecting himself to her claim of dower in the whole land mortgaged, so that eventually he could not hold the rents and profits, and is not, accordingly, bound to account for them in the present action; nor has the plaintiff any equitable claim on these rents and profits, for he purchased the demanded premises subsequently to the lease to Sarah Stratton, and at a reduced price, without doubt, in consequence of that lease.

Peter Harwood, the other defendant, is bound to account for the rents and profits of the farm from the time of his entry for the purpose of foreclosing the mortgage, and redemption will accordingly be decreed, on payment of the mortgage debt, after deducting the amount of such rents and profits. The plaintiff

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will be entitled to hold over the whole of the estate mortgaged, excepting the part leased to Sarah Stratton during her life, until he shall be reimbursed the amount paid over his proportion of the mortgage debt, unless Peter Harwood will consent to a separate redemption of the demanded premises.

JOSEPH D. SARGENT, Guardian, *versus* IRA M'FARLAND.

A and B, tenants in common, mortgage their land to C, to secure the payment of a joint and several bond, and A afterwards mortgages his moiety to C to secure a debt due from himself alone. C enters upon A's moiety of the land for breach of the condition of the second mortgage. He then brings an action against B upon the first mortgage for breach of the condition. *Held*, that the conditional judgment should be rendered for only one half of the amount of the bond.

THIS case was submitted to the Court on an agreed statement of facts. The action was a writ of entry upon a mortgage of a farm, made September 12, 1809, by the defendant and James M'Farland to secure the payment of a bond made by them jointly and severally, to the Trustees of Leicester Academy, for the sum of 800 dollars, with interest. The mortgage was duly assigned to the plaintiff as guardian of certain minors, August 30, 1828.

On May 10, 1810, James M'Farland mortgaged an undivided half of the farm to Daniel M'Farland, the father of the minors of whom the plaintiff is guardian, to secure the payment of 909 dollars 26 cents with interest. This mortgage was duly assigned to the plaintiff by Daniel's administrator, and on February 18, 1828, the plaintiff entered and took peaceable possession of the undivided half of the farm for condition broken.

The defendant and James M'Farland were tenants in common of the farm when the mortgages were made, and continued so until the plaintiff's entry on James's part.

The value of the farm does not exceed 2800 dollars.

The defendant prayed that the conditional judgment should be entered for only one half the amount due on the bond; while the plaintiff claimed judgment for the whole amount.

501 Oct. 5th.

Newton, for the defendant, contended that the defendant's interest in the land ought to be charged with only half the debt.

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The plaintiff, having taken a second mortgage of James M'Farland, the co-tenant of the defendant, can have no greater rights in regard to the first mortgage than James M'Farland. The plaintiff is to be considered exactly as James M'Farland would be, if he had paid the first mortgage; that is, he has the right to hold the whole land until the defendant pays his half of the debt. Giving judgment for only one half the debt will prevent circuity of action, for if the defendant pays the whole debt, he will be entitled to hold the whole land, until the plaintiff, as assignee of the mortgage of half the land, contributes his half of the debt. He cited *Stevens* v. *Cooper*, 1 Johns. Ch. R. 425; *Gibson* v. *Crehore*, 5 Pick. 146; *Taylor* v. *Porter*, 7 Mass. R. 355; *Taylor* v. *Bassett*, 3 N. Hamp. R 294; *Matter of Coster*, 2 Johns. Ch. R. 503; 1 Powell, 312 to 314; 2 Powell, 891.

Washburn, for the plaintiff. The plaintiff has distinct rights as assignee of the two mortgages. *Hills* v. *Eliot*, 12 Mass. R. 26; *Warden* v. *Adams*, 15 Mass. R. 233. As assignee of the first mortgage he has a right to hold the defendant's half of the land as security for the whole debt; and his taking an assignment of the mortgage of James M'Farland on the other half, does not deprive him of this right, nor is his taking possession of James M'Farland's half of the land a payment of one half the debt on the first mortgage. *Starr* v. *Ellis*, 6 Johns. Ch. R. 393; *James* v. *Morey*, 6 Johns. Ch. R. 417; *Gibson* v. *Crehore*, 3 Pick. 146; and *S. C.* 5 Pick. 475; *Popkin* v. *Bumstead*, 8 Mass. R. 491.

April term 1830.

PARKER C. J. drew up the opinion of the Court. This action, though in the form of a writ of entry at common law, is nevertheless to be decided according to principles of equity as settled in courts of chancery in relation to mortgages; for by the statute of 1785, *c.* 22, it is enacted, that in real actions on mortgage the judgment shall be conditional, that if the mortgager &c. shall pay to the mortgagee &c. such sum as the court shall adjudge due, within two months from the time of entering up judgment, with interest, then the mortgage &c. shall be void, otherwise the plaintiff shall have his writ of possession; and in a preceding clause of the same section of the statute it is enacted, that in all causes brought for forfeiture of real estate

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Sargent v. M'Farland.

upon condition, by deed of mortgage, &c. the court shall make up judgment therein for the plaintiff to recover so much as is due according to equity and good conscience.[1]

The mortgage upon which this suit is brought was made by the defendant and his brother James M'Farland, to secure a debt due from them jointly and severally to the Trustees of the Leicester Academy, and by them assigned to the plaintiff in his capacity of guardian, and the action is against Ira alone for an undivided moiety of the premises mortgaged, of which Ira and James were tenants in common. The defendant Ira, admitting the mortgage, prays that the conditional judgment may be entered for only one moiety of the debt, because if entered for the whole, and he pays the whole in order to relieve the estate from the mortgage and prevent the writ of possession from issuing, he would be entitled in equity to an assignment of the mortgage, to hold the same as security against James for his half of the debt, of which right he would at law be devested by reason of a subsequent mortgage made by James to Daniel M'Farland, father of the minors for whose use the action is brought by the plaintiff as their guardian, to whom also, in the same capacity, has been assigned the mortgage so made by James M'Farland to Daniel.

The principle on which this motion is founded is well settled in chancery, and is certainly equitable. If there be two joint debtors, or joint and several, each, as it respects the other, owing but one half the debt, though each is liable to the creditor for the whole, and they give a pledge in which they are both equally interested, and one is made to pay the whole debt, he ought to succeed to the creditor in the lien upon the pledge, until the co-debtor reimburses his part, and he will for this purpose be considered in equity the assignee of the creditor, of the pledge, and the creditor, if he does not voluntarily assign, may be compelled to do it by a bill in equity. If the plaintiff in this action had sued both the mortgagers for the whole land, in order to compel payment of the debt, the defendant, in order to redeem, would have been obliged to pay the whole debt. And then he would have stood assignee of the mortgage, in equity,

[1] See Revised Stat. c. 107, § 4.

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until the other mortgager should have contributed his share, and any second mortgage taken by the same creditor of James alone, to secure a debt subsequently incurred, would be postponed to the first mortgage in order to secure this contribution. Otherwise, by making a new loan and taking a mortgage from James of his undivided moiety, Ira, the other mortgager, may be deprived of all security, which would be unjust.

There seems to be no reason why the principle should no be applied in the present action, instead of compelling Ira to pay the whole debt and then resort to his action or bill against the plaintiff to restore his rights under the first mortgage, especially as the plaintiff has taken possession under the second mortgage with a view to foreclose the right of redemption. He has sued only for one undivided moiety of the land, which in equity stood as security for one half the debt. He has taken the other half to secure another debt voluntarily created after the mortgage was made to secure the joint debt. By this act, unless the equity powers of the Court interpose, Ira M'Farland will probably lose a large sum of money, which he had good reason to believe was secured by the joint mortgage of the whole estate.

The Court have power by the statute to render the conditional judgment for what is due in equity and good conscience. Nothing is due in equity and good conscience in relation to the land mortgaged, under these circumstances, beyond the moiety of the debt, for one moiety of the land has been taken into the hands of the creditor to secure another debt from James alone.

This however is upon the supposition that the debt secured by the first mortgage made by both, was equitably as well as legally due from both ; if, on the other hand, the money raised upon that mortgage was for the benefit of Ira alone, James being in fact his surety, the principle would not apply, for in that case the conditional judgment would be for the whole debt.

This conditional judgment for one half the debt will be no bar to an action against Ira for the residue, because the facts on which the judgment is founded will be specially set forth.

Judgment for possession, unless the defendant should within two months pay half the money due on the bond.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF MIDDLESEX, OCTOBER TERM 1829, AT CAMBRIDGE.

PRESENT:

Hon. ISAAC PARKER, Chief Justice,
Hon. SAMUEL PUTNAM, }
Hon. SAMUEL S. WILDE, } Justices.
Hon. MARCUS MORTON, }

Ex parte William Brown.

Brown, being returned to serve as a traverse juror, stated that he had served as a grand juror within three years, though it was a little more than three years since he was drafted as such. He was thereupon excused from serving. See *St.* 1807, *c.* 140, § 5, 6; *St.* 1812, *c.* 141, § 2; *St.* 1824, *c.* 119, § 1.[1]

George Coolidge *versus* Thomas Learned.

The time of legal memory or prescription in this Commonwealth, does not extend further back than sixty years.

Whether it extends further back than forty years, *quære.*

In trespass *qua. cl. fr.*, a plea that the *locus in quo* has been from time immemorial a public landing-place, in which every citizen has had from time immemorial a right of entering, was held good.

In trespass *qua. cl. fr.* where the *locus in quo* had for a long time been claimed by

[1] See Revised Stat. *c.* 95, § 12.

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the inhabitants of the town where it was situated, as a town landing-place, but not for their exclusive use, evidence of a long continued use of it by the public at large without any objection on the part of the town, was held sufficient to support a verdict finding it to be a public landing-place.

TRESPASS for breaking and entering the plaintiff's close in Watertown, on the 2d of June, 1825.

The defendant pleaded 1. the general issue.

2. That the *locus in quo* now is and at the time &c. was, and from time whereof the memory of man is not to the contrary hath been, an open, common and public landing-place, in and adjoining Charles river, the same being there a navigable river, in which landing-place every citizen of this Commonwealth now has, and at the time &c. had, and from the time whereof the memory of man is not to the contrary, hath had the liberty, right and privilege of entering by himself and with his teams, and of putting and placing thereon boards, timber, &c. borne on and landed from the river, or to put the same on board boats &c. from the landing, at all times and seasons, at his pleasure; wherefore the defendant, being a citizen, &c.

3. That the *locus in quo* is such a landing-place for the inhabitants of Watertown.

Replications were filed, traversing the facts stated in the pleas, and issues to the country were joined thereon.

The cause was tried before *Morton* J. He instructed the jury, that if they found that the plaintiff was in possession at the time of the acts complained of, they should find for the plaintiff; unless they should also find, that the *locus in quo* had been used as an open, public landing-place for sixty years, or beyond the memory of man, without having been interrupted; in that case they should find the first and second issues for the defendant.

And as to the first issue, the jury found "the defendant not guilty, inasmuch as the prescriptive right to the landing had never been lost." And as to the second, they found that the *locus in quo* is a common landing-place for all the citizens of the Commonwealth, in manner and form as set forth in the second plea. The verdict on the other issue was taken for the plaintiff by consent.

The plaintiff moved for a new trial because the verdict was

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against the law and the evidence, inasmuch as there was sufficient evidence of title and possession in the plaintiff and those under whom he claimed, and of the trespass alleged, and no sufficient evidence of an uninterrupted and immemorial use of the *locus in quo* as a public landing-place, or of a prescriptive right in the inhabitants of the Commonwealth to a landing-place there, as alleged in the second plea; and because the verdict was wholly insufficient to maintain the issues on the defendant's part.

And if a new trial should not be granted, the plaintiff moved that judgment might be rendered for him, notwithstanding the verdict on the first and second issues.

Oct. 15th, 1828.

Rand and *Bemis*, for the plaintiff, contended that a use of the *locus in quo* for sixty years as a public landing-place, would not support the second plea.

The natural import of the words *time whereof*, &c. is, time beyond all written evidence and living memory; and it is the settled construction of the law, that time beyond the memory of man reaches back to the reign of Richard 1. 3 Stark. Ev. 1204. That date was assumed by the courts, because by *St. Westm.* 1, a writ of right could not be brought upon a seisin beyond that time; 2 Inst. 238; but, in fact, the limitation of a writ of right had no connexion with prescription; 34 H. 6, 36; Fitzh. Abr. *Prescription*, 12; Lit. § 170; and when the *St.* 32 *Hen.* 8, limited writs of right to sixty years, no corresponding alteration took place in regard to the time of legal memory. If prescription depended on the limitation to a writ of right, the time of memory in this Commonwealth should be reduced to forty years. Applications were made to parliament in the reign of Edward 3, to reckon the time of memory from the first year of Edward 1, but they were rejected. 2 Rol. Abr. 269. The law was well settled at the time when our ancestors emigrated from England; 2 Rol. Abr. 269; Co. Lit. 115 *a*; and it remained unaltered at the commencement of the revolutionary war, and at the time when our constitution was adopted; and our statute of limitations was copied from the statute of *Hen.* 8. *Kingston upon Hull* v. *Horner*, Cowp. 102; *The King* v. *Pugh*, 1 Doug. 188.

Our constitution and statutes do not fix the time of memory,

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and as the common law on this subject is not inconsistent with our institutions, it must be respected as a part of our law. There can then be no prescription in this country, as the settlement of it was within time of memory; and so it has been held in some of the United States. 2 Tucker's edit. of Bl. Com. 31, 36, 266; *Ackerman* v. *Shelp*, 3 Halsted's (New Jersey) Rep. 125; *Arnold* v. *Mundy*, 1 Halsted, 67; *Carson* v. *Blazer*, 2 Binney, 490; *Young* v. *Collins*, 2 Brown's (Penn.) Rep. 293; *Chambers* v. *Furry*, 1 Yeates, 167; *Devereux* v. *Elkins*, 5 Dane's Abr. 568, § 13; 3 Dane's Abr. 254, § 20, 21. If we have not adopted the English law of prescription, and have no statute upon the subject, this Court has no authority to make a law of prescription.

A plea of prescription is not to be confounded with a plea of a lost grant. It is true that sometimes the same evidence will support either; but the mode of pleading and the rules of evidence in the two cases are very different. Co. Lit. 113 *b*; *Livett* v. *Wilson*, 3 Bingh. 115; *Fenwick* v. *Reed*, 5 Barn. & Ald. 232. Upon a plea of a lost grant, the jury are to find whether there was a grant; but in the other case, although a prescriptive right is founded upon a supposed grant, they are only to determine whether there has been a usage. Here a prescriptive right is pleaded, and it is for the Court to say, whether there could have been a deed; as otherwise, there can be no prescription. And it is clear that there could have been no deed, for a deed to all the citizens of the Commonwealth would be void.

The citizens of the Commonwealth cannot prescribe. Co. Lit. 110 *b*; *Day* v. *Savadge*, Hob. 86; *North* v. *Coe*, Vaugh. 254; *Muston* v. *Yateman*, 10 Mod. 301; *Holbedg* v. *Warner*, Palm. 331; *Wakefield* v. *Costard*, And. 151, 152; *Fitch* v. *Rawling*, 2 H. Bl. 393, and cases there cited.

Nor can the plea be considered as setting out a custom. That which is common to all the citizens, cannot be the subject of a custom; it is a right by the common law. *Fitch* v. *Rawling*, 2 H. Bl. 393.

The plea alleges a right to deposit timber on the *locus in quo* and for an indefinite time. It is a claim of profits in

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another's soil, and should have been prescribed for in a *que estate*.

Hoar and *T. Bigelow*, for the defendant, cited *Odiorne* v *Wade*, 5 Pick. 421 ; Story's Pl. 583, 584, 585.

Oct. term 1829.

WILDE J. delivered the opinion of the Court. The plaintiff's counsel except to the direction of the judge, and contend that no usage commencing within the time of legal memory is sufficient to establish a right by prescription ; and that it has been long settled, that the time of legal memory extends back to the commencement of the reign of Richard I, so that in this country no prescriptive right founded on immemorial usage can be maintained by the principles of the common law.

That the time of legal memory, according to the law of England, extends back to the remote period contended for by the plaintiff's counsel, cannot be denied ; but for what reason, or for what purpose, such a limitation should have been continued down to the present day, we are unable to ascertain. Cruise says, "that it seems somewhat extraordinary, that the date of legal prescription should continue to be reckoned from so distant a period." And to us it seems, that for all practical purposes it might as well be reckoned from the time of the creation. The limitation in question (if it can now be called a limitation) was first established soon after the *St. Westm.* (13 *Ed.* 1, *c.* 39), and was founded on the equitable construction of that statute, which provided that no writ of right should be maintained except on a seisin from the time of Richard 1.

It was held that an undisturbed enjoyment of an easement for a period of time sufficient to give a title to land by possession, was sufficient also to give a title to the easement. 2 Roll. Abr. 269 ; 2 Inst. 238 ; *Rex* v. *Hudson*, 2 Str. 909 ; 3 Stark. on Ev. 1205. Upon this principle the time of legal memory was first limited, and upon the same principle, when the limitation of a writ of right was reduced by the statute of 32 *Hen.* 8, *c.* 2, to sixty years, a similar reduction should have been made in the limitation of the time of legal memory. This was required, not only by public policy, to quiet long continued possessions, but by a regard to consistency, as it would have

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been only following up the principle upon which the first limitation was founded.

And of this opinion was *Rolle*, (2 Roll. Abr. 269,) though he admits that at his time the practice was otherwise. Why the opinion of this eminent judge, founded as it was on reasoning so solid and satisfactory, was not adopted by the courts, does not appear. But it does appear that the principle on which his opinion was founded, was respected, and carried into operation in another form. For although the courts continued to adhere to the limitation before adopted, yet the long enjoyment of an easement was held to be a sufficient reason, not only to authorize, but to require the jury to presume a grant. And it has long been settled, that the undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury the duty to presume a grant, and in all such cases juries are so instructed by the court. Not, however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long continued possession should not be disturbed.

The period of twenty years was adopted in analogy to the statute of limitations, by which an adverse possession of twenty years was a bar to an action of ejectment, and gave a possessory title to the land. Thus it appears, that although prescriptive rights commencing after the reign of Richard 1. are not sustained in England, yet a possession of twenty years only is sufficient to warrant the presumption of a grant; which is the foundation of the doctrine of prescription. In the one case the grant is presumed by the court, or rather is presumed by the law, and in the other case it is presumed by the jury under the direction of the court. The presumption in the latter case is in theory, it is true, a presumption of fact, but in practice and for all practical purposes, it is a legal presumption, as it depends on pure legal rules; and as Starkie remarks, "it seems to be very difficult to say, why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the courts, without the aid of a jury. That course would certainly have been more simple, and any objec-

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tion, as to the want of authority, would apply with equal if not superior force to the establishing such presumptions indirectly through the medium of a jury."

510 But however this may be, it is clear that when the law became settled as it now is, and a party was allowed to plead a non-existing grant, and the jury were bound to presume it, on proof of twenty years' possession, he would hardly be induced to set up a prescriptive right; and the limitation of legal memory thus became in most cases of very little importance. And this is probably the reason why the period of legal memory, as it was limited soon after the statute of *Westm.* 1, has been suffered to go on increasing to the present time, although it has long since ceased to be of any practical utility, and is utterly inconsistent with the principle on which the limitation was originally founded.

The question then is, whether the courts of this country were not at liberty to adopt the English law of prescription, with a modification of the unreasonable rule adhered to by the English courts in regard to the limitation of the time of legal memory. Certainly the law without the rule of limitation might have been adopted, and the courts here had competent authority to establish a new rule of limitation suited to the situation of the country. They had the same authority in this respect, that the courts in England had to establish the English rule of limitation. This rule could not be adopted here without a modification, and it was modified accordingly; and in conformity with the principle of the English rule of limitation. This cannot be ascertained with certainty, but it is evident that the English rule could not have been adopted, and it is to be presumed that the period of sixty years was fixed upon as the time of limitation, in analogy to the statute of 32 *Hen.* 8, *c.* 2, and in conformity with the opinion of Rolle. At what period of our history the law of prescription was first introduced into practice in the courts of Massachusetts, cannot now be determined, but certainly it was before the time of legal memory, as we understand the limitation of it; and innumerable pleas of prescriptive rights are to be found in the records of our courts. So the cases reported by Dane show that the doctrine of prescription has been repeatedly recognized and

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sanctioned by this Court. 3 Dane, 253, *c.* 79, *art.* 3, § 19. The only question has been, whether our time of legal memory was limited to sixty years, or whether it was to extend to a period beyond which no memory or record goes as to the right in question. The general opinion, we think, has been in favor of the limitation of sixty years; and we think it decidedly the better opinion. This seems to us a reasonable limitation, and as before remarked, it is founded on the principle of the English rule of limitation, which was adopted in reference to the limitation of the writ of right by the statute of *Westm.* 1. Whether since the writ of right has been limited to forty years, a similar limitation of the time of legal memory ought to be adopted, is a question not raised in this case, and upon which we give no opinion.

The case of *Ackerman* v. *Shelp*, 3 Halst. 125, has been cited, to show that the doctrine of prescription has not been adopted in New Jersey; but this is no reason why it should be rejected in Massachusetts, where it has long since been adopted, and is now familiar in practice; adopted, too, not only by the authority of our courts, but with the implied sanction of the legislature. As early as the year 1641, it was ordered and decreed by the colonial legislature, that no custom or prescription should prevail in any moral case (that is, as it was declared) "to maintain any thing that could be proved to be morally sinful by the word of God." Ancient Charters, &c. 177. This provision, it is true, manifests great ignorance of the principles of the common law, and for the purpose for which it was framed was useless and inoperative. It serves nevertheless to show, that when afterwards the doctrine of prescription was introduced into practice, it was not done without the countenance of the legislature; although certainly no legislative authority was necessary to give it validity.[1]

But it has been argued, that the right set up by the defendant cannot be maintained, by the principles of the common law, as a right by prescription, or as a custom. The cases, however, cited in support of this argument, refer either to pri-

[1] See *Melvin* v. *Whiting*, 10 Pick. 295; *Kent* v. *Waite*, 10 Pick. 138; *Reed* v. *Northfield*, 13 Pick. 94. For the laws of other States on this head, see the cases cited in 2 Hilliard's Abr. 178 *et seq.* See also Revised Stat. *c.* 119.

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vate rights or local customs. The right in question is a public prescriptive right, and as such it is well pleaded. It is similar to the easement which the public has in highways, and may well be prescribed for. In pleading such a public right to an easement, it is sufficient to aver, that the *locus in quo* is a public highway or public landing-place, &c. without showing how

512 oecame so; for it cannot be presumed that every party has knowledge of the origin of a public right. *Aspindall* v. *Brown*, 3 T. R. 265; 3 Chit. Crim. Law, 570; 3 Dane, 248; *Commonwealth* v. *Manning*, S. J. Court, Essex County, 1795, in 3 Dane, 19, *c.* 71, *art.* 5, § 8, 9, 10; *Gateward's case*, 6 Co. 60, 61.

Again, it has been argued, that the verdict is not supported by the evidence, as it does not appear that the place in question was a public landing-place for the use of the whole community; and as it has been always claimed and used by the inhabitants of Watertown as a town landing-place. But if this position could be maintained, it would not affect the merits of the case; for it would only show that the third issue should have been found for the defendant instead of the second; so that the plaintiff could not eventually prevail, if a new trial were granted. We think however the evidence is sufficient to maintain the second plea, and that the verdict is right. It is true that the inhabitants of Watertown have long claimed the *locus* as a town landing-place; but they have not claimed it for their own exclusive benefit, but it has been used by the public at large, and by other citizens besides the inhabitants of Watertown. This public use and enjoyment of the landing-place, long continued and without any interruption or objection on the part of the town of Watertown, is sufficient, we think, to maintain the second plea, and to justify the finding by the jury.[1]

Judgment according to verdict.

[1] See *Peequawkett* v. *Mashes*, 7 N. Hamp. R. 230

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JOHN BUTTERFIELD *versus* FRANCIS KIDDER.

Where money was lent before the statute of usury (1783, *c.* 55,) was repealed, and a promissory note was given for its repayment with lawful interest, and the borrower promised verbally to pay a usurious rate of interest for the loan; it was *held*, that the note was not rendered void by the verbal agreement.

THIS was an action on a joint and several promissory note, signed by the defendant as surety of one Richardson, and dated before March 4, 1826, on which day the statute of 1783, *c.* 55, respecting usury, was repealed.

At the trial, before *Wilde J.*, the defendant offered evidence 513
tending to prove, that at the time of making the note, Richardson made a verbal promise to the plaintiff to pay him eight per cent for the use of the money, but the note was given for the money actually loaned, with lawful interest. The judge being of opinion that this verbal agreement did not vitiate the note, the defendant consented to be defaulted, subject to the opinion of the whole Court on the effect of the evidence.

Hoar, for the defendant. The statute of usury, of 1783, *Oct.* 16th, 1828.
c. 55, § 1, renders void all contracts and assurances on the loan of money, on which more than six per cent is reserved. If it should be held, that where the usurious part of a contract was verbal, the legal part of it in writing was not rendered void, it would be easy to escape altogether from the statute. He cited *Fountain* v. *Grymes*, Cro. Jac. 252, and Ord on Usury, 86, 90.*

Stearns and *Joel Adams*, for the plaintiff. The verbal contract to pay two per cent was void for want of consideration, and therefore could not avoid the written note. Ord, 48; *Clayton's case*, 5 Co. 70 *b*. Besides, parol evidence cannot be received to avoid a written contract. Phil. Ev. 441; *Stackpole* v. *Arnold*, 11 Mass. R. 27; *Hunt* v. *Adams*, 7 Mass. R. 518; *Fitzhugh* v. *Runyan*, 8 Johns. R. 375.

PARKER C. J. delivered the opinion of the Court. The *Oct.* 17th 1829
verbal promise to pay eight per cent when the note was made,

* See *Atwood* v. *Whittlesey*, 2 Root, 37; *Willard* v. *Reeder*, 2 M'Cord, 369. *Merrills* v. *Law*, 9 Cowen, 65; *Lear* v. *Yarnell*, 3 A. K. Marshall, (Ken.) 420; 9 Dane's Abr. 481, § 30.

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by which there was a promise to pay the money lent and lawful interest only, ought not to vitiate the note, for it was wholly without consideration and cannot be taken as part of the contract, which was in writing and must be considered as evidence of the intention of the parties. Supposing the agreement to pay and receive more than six per cent, the plaintiff could recover nothing but what is promised by the note; the additional promise was therefore wholly nugatory and cannot affect the note. If it be said, that by this contrivance the statute may be
514 avoided, the answer is, that if that verbal promise should be carried into effect by paying unlawful interest, the taking would be an offence and the party would become liable for the penalty. But by this contract now in suit, there is not reserved or secured more than six per cent, and therefore the contract is not void.[1]

Judgment for plaintiff.

THEODORE REED *versus* LUTHER DAVIS *et al.*

An action of debt lies to recover the treble damages given by *St.* 1795, *c.* 75, § 3, for waste committed on land pending a suit for its recovery.

The declaration in such an action, if the defendant was not a party to the suit for the land, must allege that he knew of the pendency of that suit when he committed the waste.

The want of such an allegation is not cured by a verdict for the plaintiff, but is a good cause for arrest of judgment.

A count in debt for cutting down and carrying away trees on land of which the plaintiff is lawful owner, and while he had a good and legal title thereto, without averring the pendency of any suit for the land, is bad.

THIS was an action of debt against Luther Davis and Jonathan Davis, in order to recover the treble damages given by the *St.* 1795, *c.* 75, § 3.

The first count alleged, that the plaintiff Reed, on May 23, 1825, brought an action of ejectment against the defendant, Luther Davis, to recover a certain farm in Acton, in which suit Reed prevailed and recovered possession of the land; yet

[1] See Revised Stat. *c.* 35; *Scott* v. *Lloyd*, 9 Peters, 445; *U. S. Bank* v. *Waggener*, 9 Peters, 400, 401; *Train* v. *Collins*, 2 Pick. (2d ed.) 152, note 1

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the defendants, not regarding the statute, committed waste on the land during the pendency of the suit, by cutting wood and timber to the value of two hundred dollars, whereby, by force of the statute, an action had accrued to the plaintiff to recover of the defendants 600 dollars, being treble the value of the wood and timber. This count contained no allegation that Jonathan Davis knew of the bringing or of the pendency of the ejectment.

The second count alleged, that Reed "being the lawful owner of a certain messuage and lands," in Acton, which are described, and while he "had a good and legal title" to them, the defendants, on divers days between May 23, 1825, and December 16, 1827, cut down and destroyed divers other trees growing on the land, to the value of 200 dollars, against 515
the form of the statute.

The third count alleged, that the defendants, after Reed had brought an ejectment against Luther Davis, "for recovering possession of said messuage and lands," and after the service of the writ on Luther, and during the pendency of the suit, made strip and waste by cutting, felling, and destroying the wood, timber, trees, and poles, growing on the lands, to the value of 200 dollars, against the form of the statute, &c. claiming treble damages. This count contained no allegation that Jonathan Davis knew of the bringing, or of the pendency of the ejectment.

A verdict having been found for the plaintiff, the defendants moved in arrest of judgment for the following causes.

1. Because debt does not lie for the causes of action stated in the declaration.

2. Because the defendant, Jonathan Davis, was not a party to the action of ejectment, and the declaration does not aver that he knew of the bringing or pendency of that action, nor was there any evidence in the case that he knew of the bringing or pendency thereof.

3. Because the second count contains no allegation of the pendency of any action at the time when the trespasses mentioned in that count were committed, yet the verdict gives treble damages for the trespasses alleged in all the counts, without any discrimination or deduction.

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4. Because the counts are misjoined.

T. Fuller and *Brooks*, for the defendants, in support of the first exception, cited 1 Chit. Pl. 101, 105; *Peirce* v. *Spring*, 15 Mass. R. 489; *Bigelow* v. *Camb. and Conc. Turnp.* 7 Mass. R. 202.

In support of the second exception they relied on the statute, 1795, *c.* 75, § 3; and also cited Anc. Charters, &c. 523.

In support of the third and fourth exceptions they cited *Brown* v. *Dixon*, 1 T. R. 274; 1 Chit. Pl. 375; Com. Dig. *Action*, *G* 1; *Mason* v. *Waite*, 1 Pick. 452.

Hoar and *Keyes*, for the plaintiff, as to the first exception, cited *St.* 1793, *c.* 43; *St.* 1817, *c.* 173; 5 Dane's Abr. 245; *Johns* v. *Carne*, Cro. Eliz. 621; Com. Dig. *Debt*, *A* 1;

516 *Mitchell* v. *Walker*, 5 T. R. 261; *Soulsby* v. *Neving*, 9 East, 310; *Cross* v. *United States*, 1 Gall. 26; *United States* v. *Allen*, 4 Day, 474.

As to the second exception, the statute does not make it essential to maintaining this action, that the person sued should have known of the pendency of the suit for the land. But if this objection might have been made at any time, it comes too late after verdict, for this knowledge, if essential to maintaining the action, must have been proved at the trial. 6 Dane, 15, § 6; *Chester Glass Company* v. *Dewey*, 16 Mass. R. 94; *Colt* v. *Root*, 17 Mass. R. 229; *Benson* v. *Swift*, 2 Mass. R. 52.

As to the third exception, they cited *Barnard* v. *Whiting*, 7 Mass. R. 358.

Oct. 17th. PARKER C. J. delivered the opinion of the Court. We think the form of action is right, notwithstanding debt generally lies only for a sum certain. By *St.* 1793, *c.* 43, the action of debt is given to recover all penalties and forfeitures, where no form of action is provided in the act creating the penalty; and in the statute on which this action is brought, no form of action is given.[1] In *St.* 1817, *c.* 173, the legislature have established debt as the proper form of action to recover a heavy penalty, uncertain until ascertained by verdict, and it is to be presumed from these acts of legislation, with a long interval

[1] The Revised Statutes give the action of trespass in such case. *c.* 105 § 9

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between, that debt is thought to be the most proper action for breaches of statutes, notwithstanding the uncertainty in amount, of the penalty. And this conforms to the common law in regard to treble damages for not setting out tithes, as settled in Cro. Eliz. 621, and other cases cited by the plaintiff's counsel. The case in 15 Mass. R. 489, does not contravene these, for it only decides that where no form of action is given, *trespass* may lie; it having been there insisted that debt was the only action.

In regard to the objection, that the declaration is insufficient against Jonathan Davis, in not averring that he was party to the suit pending when the trespass was committed, or even that he knew of such suit, there is a difficulty; for we can hardly suppose the legislature intended to punish so severely a trespasser who was wholly ignorant that any suit was pending; and we do not think that such is the necessary meaning of the act. 517
The intent of the legislature manifestly was, to punish those who, knowing of the pendency of a suit to recover the land, should voluntarily make strip and waste in order to avail themselves of the value of the trees and timber, before judgment should be rendered. The statute is highly penal, and should therefore be limited in its application, to the object the legislature had in view. If the intention had been to subject all trespassers, during the pendency of a suit, to treble damages, there would have been no cause for specifying those against whom the suit was brought, for the general terms would comprehend them. "Such person in possession, or any other persons pending such action, and after the service of the writ therein," evidently means those who act with or under the person in possession, knowing of the suit and the service of the writ; for with such knowledge they are *in pari delicto* with the principal or party in possession. But a day laborer hired to cut wood by the occupant of the land, having no reason to doubt his title, or the owner of the next adjoining lot, who, mistaking the bounds, commits a trespass, wholly ignorant of any suit, was not intended to be amerced in treble damages. We think therefore, that, for want of an averment that Jonathan Davis was a party to the suit pending at the time of the trespass, or

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that he had knowledge of its existence, the declaration is bad, and judgment should be arrested.[1]

The second count is undoubtedly bad, in not alleging any of the facts which entitle the plaintiff to the action under the statute. It is only averred, that while the title was in the plaintiff, the trespass was committed. This is the case of all trespasses; for the possession of the plaintiff is title, so far as relates to this action of trespass. And there being no cause of action shown under the statute, the count is bad also at common law, for it does not aver, either directly or by implication, that the plaintiff was in possession of the close, either actual or constructive, when the supposed trespass was committed, but only that he was lawful owner thereof, and had title thereto; which may well be, and yet he have no right to maintain trespass.

Judgment arrested.

518 GEORGE ODIORNE *et al. versus* EDWARD WADE.

The right which the inhabitants of a town have in a way, common, or other easement, is not a corporate right, and therefore an inhabitant cannot be admitted as a witness, by virtue of St. 1792, c. 32, to prove a way for all the inhabitants, by a non-existing grant or by prescription.

TRESPASS *quare clausum fregit.* The close described was a lane in the town of Malden.

The defendant pleaded, 1. That the *locus in quo* was a public highway by prescription. 2. That it was a private way by a non-existing grant to the predecessors of the defendant. 3. That it was a private way to the defendant and his predecessors by prescription. 4. That it was a way by a non-existing grant to the inhabitants of Malden. 5. That it was a way for all the inhabitants of Malden by prescription. These pleas resulted in issues to the country.

At the trial, before *Morton* J., it appeared, that the town of Malden had, by vote, assumed the defence of the suit, and that it was defended at their expense. The defendant, to support

[1] See Revised Stat. c. 105, § 9.

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the above issues on his part, called a number of witnesses who were inhabitants of Malden. They were objected to, on account of their interest in the event of the suit, and were rejected. Odiorne v. Wade.

The defendant then, by leave of court, waived his fourth and fifth pleas, and went to trial upon the three first pleas, upon which the jury returned a verdict for the plaintiffs.

If the witnesses were improperly rejected, the verdict was to be set aside, a new trial granted, and the fourth and fifth pleas restored; otherwise judgment was to be rendered upon the verdict.

Hoar and *C. Lewis*, for the defendant, cited *St.* 1792, *c.* 32, which provides, that in suits wherein a town is a party or interested in the event of the suit, any inhabitant may be admitted as a competent witness, provided he has no other interest therein than as an inhabitant of the town. The interest of the witnesses in the use of the road comes within the statute; as much so as where the question relates to the settlement of a pauper. In both cases the interest results to the witness from his being a member of the corporation. The testimony in a case like the one now before the Court, is necessarily local, and the statute intends that in such a case an inhabitant of a town may be a witness. Oct 13th 519

Hilliard and *T. Fuller*, *contrà*, relied on *Lufkin* v. *Haskell*, 3 Pick. 356.

PARKER C. J. delivered the opinion of the Court. The question as to the competency of the witnesses whose testimony was rejected at the trial, was decided in the case of *Lufkin* v. *Haskell*. The distinction was there taken, between cases in which the town, in its corporate capacity, has an interest, and those in which the inhabitants of a town have a right of common, or way, or other easement; which is not a corporate right, but a privilege to the individual inhabitants, depending generally upon prescription arising from their locality. The statute of 1792 was only intended to remove the incompetency of witnesses in the first class of cases;[1] and as it is a departure Oct. 17th

[1] See Revised Stat. *c.* 94, § 54.

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Osborne v. Wade.

from the common law rule of evidence, it ought not to be extended by construction beyond the expressed intention of the legislature.

Judgment according to verdict.

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520 DEBORAH WALKER *versus* JOHN DEWING *et al.*

"I give and bequeath to my two sons, Israel and Timothy, a farm, and such rights and lots of common as are laid out adjoining the farm, and the buildings thereon, the same to be equally divided between them, both in quantity and quality, in manner following — I bequeath to Israel the southwardly end of said farm, except five acres, together with all that part of the meadow that lieth on the northeast side of the ditch that is cut through my meadow — I bequeath to Timothy the northwardly end of said farm, except the piece of meadow bequeathed to Israel, together with five acres before excepted — upon condition, that my two sons shall, in equal proportions, pay and discharge the several legacies bequeathed to my daughters:" — *Held*, that the sons took estates in common.

A special verdict, intended to present the question of the construction of a devise, referred to the devise as being contained in the will of I. W., mentioning the date of the will and of the probate, but not stating the devise: *held*, that the verdict was defective in substance.

A special verdict cannot be amended by the minutes of the judge, without the consent of both parties.

But with such consent it may be so amended. *Semble.*

THIS was a *writ of dower*, brought by the widow of Israel Walker.

The jury returned a special verdict, finding that Israel Walker was seised of the demanded premises during the coverture, "by virtue of a devise in the will of Israel Walker the elder, bearing date the eighth day of April, 1788, and duly approved on the fourth day of September, 1798, but whether the said Israel the younger was seised of an undivided moiety of the said premises by force of the said devise, or of the whole of the said premises in severalty, the jury pray the advice of the court. And if the court shall determine that the seisin was only of an undivided moiety, then the jury assess damages," &c.

The devise alluded to in the verdict was as follows: — "I give and bequeath unto my two sons, Israel and Timothy, the farm on which I now live in said Hopkinton, and such rights and lots of common as are laid out adjoining to said farm and the buildings thereon, privileges and appurtenances thereunto

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belonging, the same to be equally divided between my two sons aforesaid, both in quantity and quality, in manner following, *viz.* I bequeath to my son Israel aforesaid the southwardly end of said farm, except five acres, together with all that part of the meadow that lieth on the northeast side of the ditch that is cut through my meadow. I also bequeath to my son 521
Timothy aforesaid the northwardly end of said farm, except the piece of meadow bequeathed to my son Israel, together with five acres before excepted at the southwest corner of said farm next adjoining to James Gilson, to extend on the road easterly so far as to include the five acres and then with a straight line to the pond for a privilege of water; — the farm aforesaid is hereby bequeathed to my two sons aforesaid, in manner as is aforesaid, to them, their heirs and assigns forever, upon condition that my two sons aforesaid shall in equal proportions pay and discharge the several legacies which in this my last will and testament I shall bequeath to my several daughters, *viz.* Hannah," &c.

Stearns and *Draper*, for the demandant, contended that *Oct. 13th.*
the devisees took estates in severalty. The case is like grants of adjoining land, where the monuments have been destroyed.

Hoar, *contrà*, objected that no judgment could be rendered upon the verdict, because it does not state what was the devise; and the Court cannot amend a special verdict. Bac. Abr. *Verdict*, *D.* The Court cannot say that the will now presented to them, is the one to which the verdict refers. He also contended that the devise created a tenancy in common.

PARKER C. J. delivered the opinion of the Court. We *Oct. 17th.*
think it quite clear, that by the will of Israel Walker, the farm was devised to the two sons as tenants in common, and not one half to each in severalty.

But we are sorry to find, upon examining the authorities cited and others upon the subject, that no judgment can be rendered upon this special verdict of the jury, it being deficient in substance, and not capable of being amended but by consent Indeed some of the authorities do not make that exception, with which however we do not agree, as we can see no good reason why a special verdict, which, in practice, is little more than an agreed statement of facts put into this form, should not

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Walker v. Dewing.

be corrected, both parties consenting. But without such consent, (and there is none in this case,) there can be no amendment, and if the verdict is defective, there can be no judgment

522 JASON CHAMBERLAIN *versus* JAMES COCHRAN.

An appeal lies in a personal action commenced in the Common Pleas, where the *ad damnum* is laid at more than 100 dollars, although the demand set out in the writ be for less than that sum.

Oct. 17th. TROVER. The demand set out in the writ was for less than 100 dollars, but the *ad damnum* was laid at more than 100 dollars. The case was tried in the Common Pleas, and the plaintiff appealed from the judgment of that court. The question was, whether the appeal could be sustained. The *St.* 1820, *c.* 79, § 4, allows an appeal in a personal action, in which "the debt or damages demanded shall exceed the sum of one hundred dollars;" and it provides, that where the appeal shall be made by the plaintiff, and he shall not recover more than 100 dollars at the court appealed to, he shall not recover any costs upon the appeal, but the defendant shall be entitled to costs against the plaintiff. The *Court* held, that the appeal lay; and they observed, that the provision in regard to costs was intended to be the check upon appeals in cases where the sum to be recovered would be less than 100 dollars.

Hoar, for the defendant.

Hosmer, for the plaintiff, cited *Stone* v. *Kelley*, 8 Mass R. 98.

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JOHN WATKINS, by Guardian, *versus* CHARLES HILL.

A promissory note given to a creditor is not payment of the previous debt, where it is not intended as such by the parties.

Where a mortgage is given to secure payment of a note, and the assignee of the mortgage takes a new note from the mortgager, in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note, as against the mortgager himself.

Whether the exchange would operate as payment of the first note, as against a purchaser under the mortgager, *quære*.

THIS was a writ of entry on a mortgage. Plea, *non disseisivit*.

At the trial, before *Morton* J., the demandant gave in evi- 523
dence a deed of mortgage from John Howard to Simeon Tufts, dated April 4, 1818, to secure the payment of two notes for 300 dollars each, and an assignment of the mortgage from Tufts to the demandant, dated August 10, 1819, and acknowledged August 14, 1827. The demandant also gave in evidence a promissory note of Howard, dated April 4, 1822, payable to Watkins on demand with interest. It was admitted that this note was given for one of the notes described in the mortgage, the other having been paid. It was also proved, that since the date of the last note Howard had said that he did not think the mortgage was discharged; that it was not the intention of the demandant and himself to discharge it; that the old note was worn out, and that he gave the new one instead of it, and that he did not think of the mortgage, and did not believe that the demandant did, as nothing was said about it when the notes were exchanged.

The demandant is under the guardianship of Edward Wade, who returned an inventory of his property into the probate office, which inventory was made by the tenant and others as appraisers, and contains the following item: — "John Howard, note and mortgage, $ 300."

The tenant took and held possession of the demanded estate as administrator of Howard, who died after the return of the inventory.

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Watkins v. Hill.

A default was entered, subject to the opinion of the whole Court.

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Hoar, for the demandant, cited *Davis* v. *Maynard*, 9 Mass. R. 242 ; *Cary* v. *Prentiss*, 7 Mass. R. 63 ; *Perkins* v. *Pitts*, 11 Mass. R. 125.

Stearns and *C. Lewis*, for the tenant.

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PARKER C. J. delivered the opinion of the Court. Whatever effect, if any, the exchange of the notes might have had as against a subsequent purchaser of the land mortgaged,[1] it is very clear, that as against Howard, the mortgager, it could not operate as a payment of the debt secured by the mortgage. It was not so intended, as appears by the declarations of Howard, in respect to the transaction ; and then, leaving the mortgage uncancelled is of itself sufficient evidence against him, unless

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he could show, by evidence, an intentional payment of the note described in the mortgage.[1] Now the administrator who defends the suit, cannot set up a defence, except fraud, which the mortgager himself could not do. The transaction was a very natural one, as represented by Howard himself, and there is nothing in it which either legally or equitably destroys the security of the demandant in the mortgage.

Motion to take off the default overruled.

[1] See *Pomroy* v. *Rice*, 16 Pick. 24.

[1] See *Pomroy* v. *Rice*, 16 Pick. 22; *Fowler* v. *Bush*, 21 Pick. 230; *Van Eleef* v. *Therasson*, 3 Pick. (2d ed.) 14, note.

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The Inhabitants of Ashby *versus* Amos Wellington *et al.*

Where a second parish is formed in a town which has conducted its parochial affairs without organizing itself as a parish, the affairs of the first parish may lawfully continue to be managed by the town.

So that where a collector of the town gave a bond, with sureties, conditioned to pay over to the town treasurer all moneys assessed by the town and committed to him to collect, the obligors were held liable for the amount received by the collector on account of a tax assessed by the assessors of the town for the payment of the minister of the first parish.

This was an action of debt on a bond dated April 3, 1826.

The condition of the bond, which was set forth on oyer, after reciting that Wellington, at the last March meeting, was chosen collector of taxes for the town of Ashby for the year, proceeded, — "Now if the said Amos Wellington shall well and truly pay over to the treasurer of the said town of Ashby, as also the county and State tax to the treasurer thereof, all moneys assessed by the said town of Ashby and committed to him to collect, agreeably to the directions of the assessors and a vote of said town of Ashby at their annual March meeting in 1823, then" &c.

The defendants pleaded *omnia performavit.*

The plaintiffs replied, that Wellington, after the delivery of the bond, "did collect and receive as such collector, of and from the said inhabitants of Ashby, a large sum of money, viz. the sum of 515 dollars and 28 cents, which had been assessed by said town of Ashby and committed to said Wellington, collector as aforesaid, to collect, the same being assessed for the payment of the salary of Rev. Ezekiel L. Bascom, after the 525
execution and delivery of said bond and within the year next following the day of the said March meeting," &c. On this, issue was tendered and joined.

At the trial, before *Morton* J., the following facts appeared in evidence. The town of Ashby had for many years prior to the date of the bond, managed its parochial affairs as a town, without organizing itself as a parish. Some time before the date of the bond, a second parish was formed in the town, and was duly organized as a parish. From the time of the forma-

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Ashby v. Wellington.

tion of the second parish, to the time of the trial, the first parish had managed their parochial affairs by the officers chosen by the town, without any special organization for the management of parish business. The taxes in question were assessed by the assessors chosen by the town, for the payment of the salary of the minister of the first parish. Wellington was chosen collector of taxes for the town for the year 1826. Wellington, being called on by the plaintiffs, produced the book containing a list of the assessments. While the list was in Wellington's hands, he collected of one Stephen Wyman, named in it, the amount assessed upon his polls and estate, and gave Wyman the following receipt, viz. "Ashby, February 21, 1829. Received of Stephen Wyman twenty-nine dollars and thirty-three cents in full for his minister tax for 1826. Amos Wellington, Collector for Ashby."

The book produced by Wellington, beside the list of assessments, contained the following order, dated September 12th, 1826, and signed by the assessors of the town: — "Collector's Book, 1826. Minister rate. To Amos Wellington, Esq. collector of taxes for the town of Ashby. The foregoing is a list of assessments upon the polls and estates of the persons therein named, each one for his proportion of the sum of five hundred and fifteen dollars twenty-eight cents, which you are to collect and pay on or before the first day of December next."

The defendants were defaulted. The default was to stand, if the Court should be of opinion that the facts proved supported the plaintiff's replication; otherwise the default was to be taken off and a new trial granted.

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Fletcher and *Brooks*, for the defendants, suggested that after the formation of a second parish within a town, the town cannot raise a tax for the salary of the minister of the first parish, and that a collector of the town cannot in that capacity be liable for such a tax collected by him.

Hoar, for the plaintiffs.

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Per Curiam. That a town can assess a tax for parochial purposes, there being a second parish in the town, does not admit of a question. And this matter has not been pressed, it being ascertained to have been frequently decided, that affairs

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of a parochial nature may be conducted by town officers, and in the usual course of municipal proceedings. Ashby v. Wellington.

Judgment for plaintiffs.

SAMUEL P. P. FAY, Judge, &c. *versus* LAWSON VALENTINE *et al.*

An administrator is not required to give a new bond to the judge of probate, upon being licensed to sell so much only of the real estate of the intestate as shall be sufficient for the payment of debts, with incidental charges.

If such a bond is legal, still it is not a probate bond, and therefore an action upon it cannot be commenced originally in the Supreme Court.

THIS was an action of debt brought *originally* in this Court, by the plaintiff, in his capacity of judge of probate, upon a bond made by the defendants, dated October 27, 1824. The condition of the bond was, that Valentine, who, as administrator, had obtained license to make sale of real estate of his intestate for the payment of debts, should apply the proceeds of the sale (or so much thereof as should be necessary) for that purpose, and for the overplus, if any, should be responsible to the lawful heirs of the deceased; and should render a true account of his proceedings to the judge of probate.

The defendants pleaded, that the cause of action, if any, is originally within the jurisdiction of the Court of Common Pleas, and not within the original jurisdiction of this Court.

The plaintiff demurred generally.

Sewall, in support of the demurrer. The only question is, whether this bond is a *probate* bond, within the meaning of *St.* 1786, *c.* 55, § 3, which provides, that all suits in the name of any probate judge, "upon a *probate* bond of any kind, shall be *originally* commenced in the Supreme Judicial Court." The defendants will say that this is not a probate bond, because the judge of probate is not required by *St.* 1783, *c.* 32, § 1, or by any statute, to take a bond upon the sale of land for the payment of debts, except where it is expedient to sell more than is necessary for that purpose. We contend that it is sufficient, if he is authorized to take such a bond. And further, that it is not only customary, but necessary to take the bond, 527 Oct. 15th

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in order to secure the due appropriation of the proceeds of the sale. That is not provided for by the administration bond, whether in the old form, or in the form prescribed by *St.* 1817, *c.* 190, § 14; which last requires real estate to be inventoried. [*Parker* C. J. Formerly the administration bond did not cover the proceeds of land sold under a license, for the payment of debts, but I think the statute of 1817 alters the law in this respect.] The object of inventorying the real estate must be, to give information to creditors, of the amount of the intestate's property; but the administrator has no more to do with the land than he had before. There is no provision in the administration bond, that he shall account for real estate. White's View of the Jurisdiction &c. of Courts of Probate, 108; *Hasty* v. *Johnson*, 3 Greenl. 286; *Nelson* v. *Jaques*, 1 Greenl. 139; *Knox* v. *Jenks*, 7 Mass. R. 488; *Freeman* v. *Anderson*, 11 Mass. R. 190; *Henshaw* v. *Blood*, 1 Mass. R 46.

Osgood, contrà, insisted that a probate bond is one which must by law be given to the judge of probate, and which he is authorized to take *virtute officii*; that the bond in the present case was not required by law; and that since the *St.* 1817, *c* 190, a creditor has his remedy upon the administration bond in case the administrator neglects to apply to the payment of debts, the proceeds of land sold under a license for that purpose. *Baylies* v. *Chace*, 1 Pick. 230; *Thomas* v. *White*, 12 Mass. R. 367; *Hasty* v. *Johnson*, 3 Greenl. 286; *Nelson* v. *Jaques*, 1 Greenl. 144; *Newcomb* v. *Wing*, 3 Pick 168.

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Per Curiam. The bond in question is not required by the statute.[1] It may be a legal bond, but a suit upon it should be commenced in the Court of Common Pleas, and not in the Supreme Court.

Plea adjudged good.

[1] See Revised Stat. *c.* 63, § 2; *c.* 71, § 6.

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SAMUEL P. P. FAY, Judge, &c. *versus* ISAAC HURD Junior *et al.*

F mortgaged land to C. with condition for the payment of a sum of money due to a minor, of whom C was guardian. C not wishing to retain the guardianship, the judge of probate made a decree appointing R guardian, "he giving bond as the law directs"; and a letter of guardianship was made out in the probate office, indorsed, "to be delivered to R when bond is filed." R never filed a bond nor received the letter of guardianship, but he assumed to act as guardian; and no decree was passed discharging C from the trust. R, after his appointment as above stated, sold the mortgaged premises as the agent of F. C claimed the money of the purchaser, on account of the minor, and part of it was paid to him; the residue was afterwards paid to R in the presence of C, and R gave the purchaser a deed from F, and C discharged the mortgage. The money was immediately paid over by R to C. C testified that he received it in discharge of a debt due from R, and not for the use of the minor. Another witness testified, that being called upon by C to pay a note given by F to C, he told C he thought the land was sold for enough to pay the mortgage and this note; C replied, that the mortgage had been paid to him, but that he had received nothing towards the note. *Held*, that R was the agent of C, as well as of F; and that C should be considered as having received the money for the minor, as otherwise fraud must be presumed, and that F was discharged from his liability to the minor.

It seems, that the proceedings in the Probate Court, and the doings of R, did not constitute him the guardian of the minor; and that C continued in that office.

THIS was an action upon a bond given to the judge of probate, in 1814, by Hurd, as guardian of Julia Danforth, then a minor, and by Luther French and Joseph Locke, the other defendants, as his sureties

The parties stated the following facts.

On March 16, 1816, Hurd, at his own request, was dismissed from his guardianship, and Josiah Crosby was on the same day appointed guardian in his room.

On December 4, 1816, Hurd settled his account as guardian, in the Probate Court, when there was a balance against him of 478 dollars 48 cents. It appears by a writing on the account, 529
signed by Crosby, that he was present and made no objection. Hurd having become insolvent, his sureties were called upon to pay the balance above mentioned. It not being convenient for French to make the payment, he, on November 1, 1819, made a mortgage in fee to Crosby, of certain land, for the consideration of 500 dollars, but without any note or other personal security to accompany the mortgage: — upon condition, that if French, his heirs, &c. pay "to the said Crosby,

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his heirs, executors, administrators or assigns, one half of the amount of the balance due from Isaac Hurd junior to Julia Danforth, for whom the said Crosby is guardian, according to said Hurd's settlement in the Probate Court as late guardian to said Julia, with interest on said amount, within six months from this date, then this deed shall be void; otherwise," &c. The deed was immediately acknowledged and recorded.

Crosby not wishing to retain the guardianship, Julia Danforth, in March, 1823, being then eighteen years of age, made choice of William Richardson as her guardian, and on the 5th of that month the judge of probate made a decree appointing Richardson guardian, "he giving bond as the law directs." A letter of guardianship was made out, but not delivered to Richardson, on which the register of probate indorsed the words,— "To be delivered when bond is filed." And at the same time Crosby settled his account of guardianship, to which Richardson assented by his signature to the following words, written on the account by the judge of probate. "Having seen the within account of Josiah Crosby, hitherto guardian of Julia Danforth, (to which minor I have this day been appointed guardian,) I have no objection to make thereto. March 5, 1823." No decree or order was made by the judge, that Crosby should be discharged from his trust of guardian, nor is there any written request on file in the probate office, for such discharge. Richardson soon after assumed to act as guardian, and continued to do so until his death. On November 24, 1823, he received of Locke, the co-surety with French on Hurd's bond, the sum of 339 dollars 32 cents, and gave a dis-
530 charge for the same under his hand and seal as guardian; and afterwards, on June 15, 1826, he died, without having filed any bond in the probate office.

French made Richardson his agent for selling the land mortgaged to Crosby, but whether before or after March 5, 1823, did not appear, and Richardson, as such agent, sold the same in April, 1823, to William Bowers, for 685 dollars. Within a few days after the sale, Crosby applied to Bowers, in the absence of Richardson, to know whether he was about to make a payment of money to Richardson. Bowers answered that

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he was; whereupon Crosby said the money was coming to him on account of Julia Danforth. Bowers then paid Crosby 50 dollars on account of the purchase, for which Crosby gave him a writing to show that he had paid that sum; but whether in the form of a receipt or a note, did not appear. Some days after, Bowers presented that paper to Richardson, who allowed the 50 dollars towards the purchase money of the land, Crosby being present but saying nothing in relation to the matter. On May 21, 1823, Bowers went with Richardson to Crosby's, where Bowers paid the residue of the purchase money to Richardson, and received from him French's deed of the land, and at the same time Crosby executed a discharge, under seal, upon the back of the mortgage, as follows: — "I acknowledge to have received full satisfaction for the within mortgage deed, and desire the same may be entered in the margin of the record thereof. Witness," &c. The money paid by Bowers to Richardson was immediately paid over by Richardson to Crosby. But Crosby testified, that he received the money in discharge of a debt due from Richardson to him, and not as the money of Julia Danforth or for her use. It was further testified by Andrew French, the son of Luther, that he having undertaken to pay his father's debts, Crosby, about a year after the sale of the land, called on the witness for payment of a note of about 200 dollars, which Crosby held against Luther. The witness told Crosby, he thought the land was sold for enough to pay the mortgage and the note. Crosby replied, that the mortgage had been paid to him, but he had received nothing towards the note.

The question was, whether the defendants were still liable for the sum secured and paid by French in the manner above stated.

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Stearns, for the defendants. The appointment of Richardson as guardian was complete, although the bond was not filed; and the sureties of Hurd were justified in making their payments to Richardson. 5 Bac. Abr. 188, 190, *Officer*, *E*; *Marbury* v. *Madison*, 1 Cranch, 156, 157; *Nason* v. *Dillingham*, 15 Mass. R. 170; *Bucknam* v. *Ruggles*, ibid. 180.

Either Richardson's appointment was complete, or Crosby continued to be guardian. No decree was passed, discharging

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Crosby from the trust. If he continued in the trust, then he received the money as guardian.

Crosby, by taking the mortgage to himself, his heirs, &c. made the debt his own. At least he thus became trustee for the minor, and was bound to see that the security was appropriated to her benefit.

But if that was not a payment, the other facts in the case show a payment. The whole amount due on the mortgage is paid over to Crosby, and he discharges the mortgage. It would be a fraud in him to apply the money in discharge of the private debt due to him from Richardson.

Hoar, contrà. The case of *Fay* v. *Richardson*, 7 Pick. 91, shows that Richardson was not the guardian of the minor.

Admit that Crosby was the guardian, Hurd is not exonerated from this debt. He must show that it was paid to Crosby as guardian. Giving the mortgage to secure future payment, is not of itself a payment. The burden is on the defendant to show that the debt has been paid.

If Crosby has acted fraudulently, he is answerable in an action in the proper form and brought by the proper party. That question cannot come up in the present suit.

Oct. 17th. *Per Curiam.* We think that Richardson never was the guardian. The case is not like that of *Marbury* v. *Madison*. There the appointment by the president of the United States with the advice of the senate, was complete and beyond the control of the president. Here there was only a conditional appointment, and the condition was not performed. We rather incline to the opinion, that Crosby continued in the office of guardian.

When Crosby, being guardian, took the deed of mortgage from French to secure the sum due to the ward, he became
532 responsible for the debt, and continued so until the payment of the proceeds out of the land mortgaged. He might perhaps have discharged himself by assigning the mortgage to any successor duly appointed, but this has never been done. When the estate was sold, Crosby claimed the proceeds as due to his ward; and he himself cancelled the mortgage. He received part of the purchase money directly, and the residue through Richardson, who unquestionably acted as his, as well as

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French's agent. He either gave up the security of his ward fraudulently, or he cancelled it upon receiving for her the money due. And the latter ought to be presumed, especially as the land was sold for the express purpose of paying that debt. The payment of French was to Crosby, who held the mortgage in trust for the ward. French ought therefore to be discharged.

CATHARINE STEARNS *versus* BENJAMIN SWIFT.

To a writ of dower, the tenant, who is a purchaser, pleads, that he cannot deny the right of the demandant to be endowed, but that he has made improvements on the land, and that he has always been ready to render to the demandant her reasonable dower, according to her just rights in respect to the increased value of the land, and that on a day specified he assigned a third part of the land, in the condition in which it was at the time of the alienation, by metes and bounds; and he prays that the increased value may be inquired of. Upon demurrer it was *held*, that, as a plea in bar, the plea was bad; and that it must be construed as admitting a right to recover dower according to the value at the time of the alienation, but denying the right to be endowed of the improvements.

If a wife joins in a deed with her husband, "in token of her relinquishment of dower," without any words of grant on her part, although the husband may have previously parted with all his right and title to the grantee named in the deed, she is nevertheless estopped to claim her dower.

WRIT of dower *unde nihil habet*.

The tenant pleads as to a quarter of an acre, part of the demanded premises, that "he cannot deny the right of the said Catharine to be endowed as of the endowment of the said David Stearns, heretofore husband of the said Catharine;" but he says that one Larkin recovered a judgment against the husband, and on April 29, 1798, levied his execution on this part, and that the tenant now has the estate of Larkin, and that since the levy, this part has been greatly improved by 533
Larkin and the tenant, and that the tenant "has always been ready, &c. and yet is ready to render to the said Catharine her reasonable dower in said part, according to her just rights in respect to the improvements and increased value thereof as aforesaid," and that on the 21st day of October, 1826, he assigned to the demandant, by metes and bounds, 4782 square feet of this part, "and then and there offered the same to the

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Stearns v. Swift.

said Catharine to hold the same for the term of her life, as her dower of and in the said part;" and he avers, "that the same land, with the privileges so assigned as dower, is a full third of said part, in the condition it was in at the time the said Larkin received seisin thereof as aforesaid;" and he "prays that the improvements and increased value of the part aforesaid, made as aforesaid, may be inquired of in such manner as the Court shall consider." And as to the residue in which dower is demanded the tenant pleads, that the demandant ought not to have her dower in such residue, being the same estate set off to James Noble on execution against the husband, because he says, that the husband, on the 30th of March, 1799, together with one Mary Cochran, by their deed of that date, duly acknowledged, &c. granted, bargained and sold such residue to Noble in fee and in mortgage, and that the demandant, of her own free will, testified by her signing and sealing the deed, relinquished all her right and claim of dower in such residue to Noble, and that Noble, on the 31st of October, 1809, (having before that time had the equity of redeeming such residue released to him by the husband,) conveyed such residue to the tenant and his heirs, "and this the said Swift is ready to verify; wherefore he prays judgment if the said Catharine ought to have her dower in the residue aforesaid, and for his costs."

The demandant demurs to the plea as to the quarter of an acre, and assigns for causes of demurrer, 1. that the tenant has undertaken to set out an assignment of dower in that part, and has made several material and substantive allegations for the purpose of avoiding and defeating the demandant's action thereof, and yet he has not averred that he is ready to verify the same, and has not concluded with a verification; 2. That
534 he has undertaken to set out an assignment of dower in that part, and yet has not alleged that the demandant assented to or agreed to the same, or that she has accepted the same; and because the plea is double, uncertain, defective and informal.

And as to the plea relating to the residue of the land, the demandant craves oyer of the deed of March 30, 1799; (which was a deed in fee and in mortgage, in common form, from David Stearns and Mary Cochran to James Noble, with

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the concluding clause as follows, — "In witness whereof we, the said David, and Catharine, wife of said David, in token of her relinquishment of dower in the premises, have hereunto set our hands and seals," &c.) and after oyer the demandant replies, *precludi non*, because on March 29, 1798, Noble levied an execution against her husband, upon such residue, by means whereof Noble, on that day, became seised and possessed of all her husband's estate in such residue, subject only to his right to redeem the same within one year, and her husband never did redeem the same; and so her husband on the 30th of March, 1799, had no estate, legal or equitable, in such residue, nor did any estate, right, title or interest, of any sort, pass from him by the deed of that date.

The tenant joined in the demandant's demurrer, and demurred generally to her replication.

Morey, in support of the first cause of demurrer assigned, cited 1 Chit. Pl. 537; 1 Saund. 103, note 3; *St.* 4 *Anne*, *c.* 16, § 1; Jackson on Real Actions, 321; *Allan* v. *Smith*, 1 Cowen, 180. *Oct. 14th.*

With respect to the second cause, he referred to *St.* 1785, *c.* 40, § 1; Lib. Intrat. 109; Rast. Ent. 229, cited in Story's Pl. 350; Jackson on Real Actions, 322, 323, 324; Stearns on Real Actions, 308, 476; *Johnson* v. *Morse*, 2 N. Hamp. R. 48.

As to the "residue" of the land, he contended that the clause of relinquishment of dower, contained in the deed of March 30, 1799, was inoperative, because the husband had previously parted with all his estate. Where the deed of the wife is subsequent to the conveyance by the husband, terms of grant must be used to convey her right of dower. *Fowler* v. *Shearer*, 7 Mass. R. 14; *Stinson* v. *Sumner*, 9 Mass. R. 143; Jackson on Real Actions, 310, 326, 327; Story's Pl. 359, 360; Stearns on Real Actions, 289, 290; Com. Dig. *Estoppel*, *C.*

Hoar and *Tufts*, *contra*. The plea could not allege that the dower set out was accepted by the demandant, for the fact was otherwise; but it does not follow that the plea is bad on that account. It was sufficient for the tenant to set out a third of the land and tender it to the demandant. If she claims to 535

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have it assigned by commissioners, she should have denied that it had been properly assigned, and then the question could have been tried.

The verification at the end of the plea, applies to both branches of the plea.

In regard to the release of dower, they relied on some of the authorities cited for the demandant.

Nov. 3d. WILDE J. delivered the opinion of the Court. On these pleadings two questions arise. The first is, whether the demandant is entitled to recover as to the quarter of an acre, part and parcel of the premises described in the writ. And as to this, we are of opinion that the plea in bar, if it was intended as such, is not well pleaded. It is not alleged, according to the established form of pleading, that the demandant ought not to maintain her action as to this part of the premises; but on the contrary, her right to be endowed therein is expressly admitted. If in that part of the plea which follows, it was intended to set out and allege an assignment of dower to the demandant, it is manifestly repugnant to the admission before made; and is inconsistent with the conclusion of the plea, which prays that the increased value and improvements, made by the tenant after the alienation of the estate by the husband, may be inquired of in such manner as the Court shall consider. The only consistent manner in which the plea can be understood, is to construe it as admitting the demandant's right to recover her dower according to the value of the land at the time of the alienation, but denying her claim to be endowed of the tenant's improvements. And to this extent, and no further, we think the demandant is entitled to judgment on these pleadings.[1]

As to the residue of the land demanded, we think the demandant's claim to dower therein is barred by her deed of release, as set forth in the replication.

536 It is no valid objection to the operation of this deed, on the part of the wife, that her husband had no right or title to the land at the time of its execution. To render the transfer of

[1] See *Powell* v. *Monson & Brimf. Manuf. Co.* 3 Mason, 370; *Waters* v. *Gouch*, 6 J. J. Marshall, (Ken.) 591; 10 Wendell, 480; 4 Kent, (3d ed.) 64 *et seq.*; cases cited in 1 Hilliard's Abr. 72, 73.

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an estate effectual and complete, it is not essential that the sale by the husband, and the relinquishment of dower by the wife, should be made by the same deed, or at the same time, although this is the usual mode of conveyancing. But if after a sale by the husband, or after his estate has been taken on execution, the wife will voluntarily relinquish her claim to dower by a separate deed, it will effectually bar her dower. *Fowler* v. *Shearer*, 7 Mass. R. 14.[1]

Nor is it any objection, that the deed of the wife, as in the present case, is a mere release, containing no words of grant; for it operates by way of estoppel, and not by way of grant; so that the form of the deed is not material. We are therefore of opinion, on the whole matter, that the plea as to the quarter of an acre, and the replication as to the residue, are both insufficient; and that the demandant is entitled to her dower in the small piece of land, only according to its value at the time it was alienated by the husband.

[1] See *Shaw* v. *Russ*, 14 Maine R. (2 Shepley,) 432; *Powell* v. *Monson & B. Manuf. Co.* 3 Mason, 347; *Rowe* v. *Hamilton*, 3 Greenleaf, 63; Revised Stat. c. 60, § 7; 1 Hilliard's Abr. 79, 80.

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JOSEPH TUFTS, Administrator, *versus* SAMUEL KIDDER.

A owing B a note, gave several new notes to B, all together being of smaller amount than the old note, and payable at future days. At the same time they entered into a written agreement, that if the new notes were paid "when due," the old note should be given up to A to be cancelled, but if any of the new notes were not paid "when due," the old note should be in force, and B in such case agreed, that if he should see fit to enforce the old note, he would enter upon it such sums as A should have paid on the new note, and return the other new notes to A. A paid the first of the new notes. But the second not being paid on the day when it became due, B had a writ made out on the old note against A, and afterward indorsed on the old note the amount which A had paid, and returned the new notes, and then delivered the writ to the officer, who served it: —

Held, 1. That payment of the new notes on the days when they became due, was necessary, to entitle A to the benefit of the agreement:

2. That A having failed to perform this part of the agreement, B had a right to sue on the old note:

3. That the indorsing of the first payment on the old note, and the returning of the other new notes, was not a condition precedent, in order to entitle B to sue on the old note:

4. But *it seems*, that if the performance of these acts had constituted a condition precedent, they were done seasonably.

ASSUMPSIT to recover the amount due on thirteen promissory notes and four checks. The defendant pleaded *non assumpsit*, and *actio non accrevit infra sex annos*.

The case was tried before *Morton* J. The plaintiff gave in evidence the notes and checks, all of which were payable more than six years before the suit was brought. He also gave in evidence a written agreement between his intestate and the defendant, dated January 24, 1824, by which, after reciting that the defendant was indebted to the intestate in divers sums of money according to the notes and checks, and from misfortunes was unable to pay the full amount of them, the defendant agreed to give the intestate four new notes, which it is said "he has this day given," for 500 dollars each, payable in two, three, four, and five years, and that the intestate should keep the old notes and checks until the new notes were paid, and that if the new notes or any of them were not paid, "when due," the old notes and checks should all be in force, deducting any sums the defendant should have paid on any of the new notes. By the same instrument the intestate agreed, that

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when the new notes should be all paid, he would give up the old notes and checks to the defendant to be cancelled, and that they should then be void; but that if any of the new notes were not paid "when due," and he should see fit to enforce payment of the old notes and checks, he would enter upon them such sums as Kidder should have paid on any of the new notes, and give up to the defendant the new notes which should be unpaid. The instrument also contained an agreement by the defendant, to purchase a pew of the intestate and pay 150 dollars for it. The agreement concluded by saying, that the defendant was to have three months to pay each of the new notes, in addition to the times mentioned in them.

The first of the new notes was paid. The second note, which fell due April 24, 1827, was not paid on that day. The next day, however, the defendant called on the plaintiff and said he was ready to pay it. But the plaintiff refused to receive payment, stating that as he was a trustee, acting for others, he had no right to accept it. The plaintiff, on August 27, 1827, gave up all the new notes to the defendant, and then delivered the writ in this suit to the officer, who immediately served it. It was admitted by the plaintiff, that the indorsement on the old notes, of the sums paid on the new note, was made after the writ was filled out, but before it was delivered to the officer. Two or three weeks afterwards the defendant offered the new notes to the plaintiff, but he refused to receive them.

Evidence was offered on the part of the defendant, which tended to show that he had provided funds and called at the plaintiff's office on April 24, 1827, in order to pay the note which then became due, but that the plaintiff was not within.

The defendant was defaulted. Judgment was to be entered on the default, or the plaintiff to become nonsuit, according to the opinion of the whole Court.

Fletcher and *Gordon*, for the defendant. The indorsement upon some of the old notes, of the money paid on the new note, and the giving up of the remaining new notes to the defendant, were a condition precedent, until the performance of which the right of action upon the old notes was not revived This condition was not performed until after the suit was

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brought; for the filling out of the writ, not the delivery of it to the officer, is the commencement of the action. *Gardiner* v. *Corson*, 15 Mass. R. 500; *Johnson* v. *Reed*, 9 Mass. R. 78; *New England Bank* v. *Lewis*, 2 Pick. 125; *Ford* v. *Phillips*, 1 Pick. 202.

The plaintiff cannot elect to rescind the agreement, without restoring the defendant to the same condition in which he was before it was made. But the arrangement about the pew still remains unaltered.

The defendant, if it was necessary for him to pay on the very day the note fell due, did all that he could, for he went to the plaintiff's office, but he was not within. If the plaintiff intended to hold the defendant to a strict compliance with the agreement, it was his duty to be at his office to receive the money.

But the defendant was not bound to pay on the very day on which the note fell due. The expression "when due" is indefinite; *when* means *after*. A tender to the plaintiff upon the new note at any time before he had elected to enforce the old notes, was in season.

Hoar and *Tufts*, *contrà*, denied that indorsing the money and giving up the new notes, were a condition precedent. If they were, those acts, having been done while the writ still remained in the plaintiff's power, were done seasonably. *New England Bank* v. *Lewis*, 2 Pick. 128; *Stanton* v. *Blossom*, 14 Mass. R. 116; *Shed* v. *Brett*, 1 Pick. 412. The acts proved on the part of the defendant, did not amount to a tender, or excuse the want of it, on the day when the note fell due. *Wade's case*, 5 Co. 115; Co. Lit. 202.

Nov. 23*d.* WILDE J. delivered the opinion of the Court. It being admitted that the notes and checks claimed by the plaintiff were originally valid contracts, he is entitled to recover, unless these demands have been discharged, as the defendant contends they have been, by a compromise made with the plaintiff's intestate. The defendant having met with misfortunes in business and being unable to pay the full amount of his debts, the intestate agreed to relinquish a part of his claims, on the condition that the residue should be paid by instalments at the times specified in the new agreement. But the old notes were

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not discharged, but were to be retained by the plaintiff's intestate to await the performance of the condition of the new agreement. The condition was, that if the new notes, taken in pursuance of the agreement, or any of them, should not be paid when due, then the intestate was to be at liberty to enforce the payment of the original notes and checks, indorsing on them such sums, if any, as might be paid on the new notes, and giving up such as might remain unpaid to be cancelled. One of the new notes was duly paid. Another became payable, but was not paid the day it fell due. The defendant offered to pay it the day after, but this the plaintiff declined, insisting on his strict legal rights, which he conceived he had no right to waive, acting as he did as trustee of the heirs and creditors. The question then is, whether the non-payment of the note on the day it fell due was a breach of the condition of the new contract; and we can entertain no doubt that it was.[1]

The condition will bear no other construction than the one contended for by the counsel for the plaintiff. The object of the condition was, to insure the punctual payment of the new notes, under a penalty.

It has been argued that the action was prematurely commenced, as the plaintiff's right of action did not revive on the old notes and checks until he had indorsed the money paid on one of the new notes and had given up the others. But if this were necessary, it appears to have been seasonably done; it being admitted that the indorsement was made before the delivery of the writ to the officer. But we apprehend this was not necessary, provided the plaintiff was ready to do it; for we do not consider the indorsement of the money and giving up the new notes as a condition precedent. His right of action revived immediately on the breach of the condition by the non-payment of one of the notes. He would not however be entitled to judgment until he had performed the stipulation on his part in relation to the new notes.

Motion to take off the default overruled.

[1] See *Makepeace* v. *Harvard College*, 10 Pick. 305.

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LEONARD HARRIS *versus* JOHN RAYNER *et al.*

In an action for an injury sustained by the oversetting of the defendants' stage-coach, the plaintiff alleged, "that he paid for his passage in the coach from Albany to Boston, the sum of ten dollars, being the usual fare, and in consideration thereof the defendants undertook faithfully and carefully to transport him from Albany to Boston;" but the proof was merely, that the plaintiff rode in the coach a part of the route, namely, from Worcester to Boston, which is a portion of several lines of travel: —

Held, that the evidence did not prove the contract set out in the declaration.

Held, also, that the averment of the consideration of the contract was material.

Held, also, that the evidence would warrant the jury in presuming a transportation for hire.

THIS action was brought to recover damages for an injury sustained by the plaintiff by the oversetting of a stagecoach owned by the defendants, through the negligence of their driver.

The plaintiff alleged, "that he paid the defendants for his passage in their stage from Albany to Boston, the sum of ten dollars, being the usual fare for said passage, and the defendants, in consideration thereof, undertook and promised faithfully and carefully to transport the plaintiff on the said passage from Albany to Boston."

The case was tried on the general issue, before *Morton* J. The plaintiff proved that he rode in a stagecoach, owned by the defendants, from Worcester to Boston, and that just as he arrived at Boston the coach was overset by the carelessness of the driver, and the plaintiff thereby injured.

The plaintiff produced no proof in support of the allegation above recited, and the defendants objected to his recovery without further evidence. But the judge ruled that the allegation was not material, and that the plaintiff might recover without proving it. In the course of the trial it appeared, from the testimony on the part of the defendants, that it was usual in this line of stagecoaches for passengers to pay their fare in advance.

The jury returned a verdict for the plaintiff; but if the above decision was wrong, a new trial was to be granted.

Oct 17th. *Hoar*, for the defendants. Although the plaintiff was not required to state the contract so particularly as he has done, yet, having made the allegation, he was bound to prove it. *Cudlip*

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v. *Rundle*, Carth. 202, cited in *Bristow* v. *Wright*, 2 Doug. 668; *Rex* v. *Tanner*, 1 Esp. R. 304, *Weall* v. *King*, 12 East, 452; 3 Stark. Ev. 1529, 1531, 1542; 2 Stark. Ev. 84, Metcalf's note; *Snell* v. *Moses*, 1 Johns. R. 105.

T. Fuller, *contrà*. The reception of the plaintiff into the stagecoach implies a contract to carry him safely, and it was not necessary to allege or prove any thing more. The allegation that a sum of money was paid may be rejected as surplusage. *Coggs* v. *Bernard*, 2 Ld. Raym. 911, 919; *Elsee* v *Gatward*, 5 T. R. 143; *Shiells* v. *Blackburne*, 1 H. Bl. 158; *Gwinnet* v. *Phillips*, 3 T. R. 645; *Peppin* v. *Solomons*, 5 T. R. 496.

But if a pecuniary consideration must be proved, there was evidence of one here, it being usual to take money for the transportation of passengers in the defendants' coaches. It was not necessary to prove any particular sum, as this was an implied contract.

WILDE J. delivered the opinion of the Court. We think there was no sufficient proof at the trial, of the contract as alleged in the declaration. The declaration alleges a contract on the part of the defendants, to transport the plaintiff from Albany to Boston. The proof was, that the plaintiff rode in the defendants' stage from Worcester to Boston; and although this is part of the route from Albany to Boston, yet it is part also of many other lines of travel, so that the contract, as alleged, remains without proof. *Nov. 23d.*

The proof is also defective in another respect. It is alleged that the plaintiff paid for his passage the sum of ten dollars, and this allegation also is unsupported by evidence. It has been contended that this averment in the declaration is immaterial, and may be rejected as surplusage. But it is clear, we think, that this is a material averment. The consideration is an essential part of a contract, and must be truly and fully set forth.[1] It is true that the defendants might be answerable for wilful or gross negligence on an undertaking to carry without

[1] See *Roper* v. *Stone*, Cooke, 499; *Mosby* v. *Leeds*, 3 Call, 439; *Cook* v. *Bradley*, 7 Connect. R. 57; *Brown* v. *Adams*, 1 Stewart, 51; Chitty on Contr. (4th Am. ed.) 21 *et seq.*

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hire; but in the performance of such an undertaking they would be bound to use only ordinary care. Whether the defendants were guilty of that degree of negligence which would be sufficient to charge them under such a contract, we cannot
543 determine, the evidence not being reported. It is sufficient for the present, that it is not the contract declared on.

Enough, however, of the evidence is reported to have warranted the jury to presume a transportation for hire, had it been left to them to presume the fact. But as this was ruled to be immaterial, that part of the case was withdrawn from their consideration.

New trial granted.

JAMES WOODBURY *et al. versus* DANIEL LONG.

The plaintiff contracted to make some pew pannels for J, who was building a meetinghouse, to be paid for in cash on the delivery of them. The plaintiff made the pews and brought them to the meetinghouse, and deposited them there, but J was not there, being absent from town, but only his workmen. *Held*, that the pannels were not delivered but still remained the property of the plaintiff, and were not liable to attachment as the property of J.

A tortious taking, is, in an action of trover, proof of a conversion.

If the goods of the plaintiff are attached as the property of J, the plaintiff may maintain trover against the attaching officer, without proving any demand, even where the goods are so situated as that the officer might have fairly supposed them to be the property of J.

THIS was *trover* for the pannel work of sixty-six pews, which the defendant, as a deputy sheriff of the county of Essex, had attached as the property of John Johnson, first at the suit of James Homer, and secondly at the suit of a committee of a religious society in Amesbury.

At the trial, before *Morton* J., the following facts appeared in evidence. In the spring of 1826, Johnson made a contract with the committee of the religious society above mentioned, to build and finish a meetinghouse for an agreed sum, and to furnish all the materials. The house had been raised, covered, and enclosed by boarding up the lower windows, hanging a coarse door by which to enter, and on which was put a lock for the purpose of shutting up the house when the workmen

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left it. The pews in question were made, and the materials furnished, at Lowell, by the plaintiffs, with whom Johnson had contracted for them at a certain price. After they were finished, Johnson proposed to the plaintiffs, that if they would transport the pews to Amesbury and deliver them there, he would give them an order on the committee, and that on the delivery of the pews at Amesbury they should receive their pay. This proposition was acceded to, and Johnson drew his order on the committee for the value of the pews at Lowell, which was delivered to one of the plaintiffs, and which he carried with the pews to Amesbury. When the pews arrived there, the committee refused to accept the order and objected to the pews as not being so good as they had contracted for with Johnson. The pews were left in the meetinghouse by the plaintiffs, and were piled up together, separate from the other lumber and materials in the house, by Johnson's workmen, he not being present, but out of the town, when they were left. 544

At the time the defendant attached the pews, which was on December 5, 1826, he also attached a quantity of nails, and some window sashes ; the window sashes being piled up at the side of the house, and the nails being chiefly in casks. There were, at the time, boards and other materials upon which Johnson's carpenters were at work. At the time of the attachment Johnson was absent from Amesbury. After the pews were attached, they were removed, with some of the other property attached, to a barn at a small distance, where they remained at the time this action was commenced. It was proved that the defendant, after this action was brought, had declared that he was indifferent how the case turned, for the committee had agreed to indemnify him for making the attachment.

No demand of the pews having been made by the plaintiffs, it was contended, on the part of the defendant, that the action could not be supported, because, from the place in which the property was found, the defendant must have supposed the pews to be Johnson's property, and therefore acted in conformity with his duty in making the attachment. But the judge instructed the jury, that if there had not been a delivery of the pews by the plaintiffs to Johnson or his agent, and an acceptance of the pews on his part, the property remained in the

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plaintiffs, and they were entitled to recover against the defendant without a previous demand.

The jury found a verdict for the plaintiffs, and the defendant excepted to the above instructions. If they were wrong, a new trial was to be granted; otherwise judgment was to be rendered on the verdict.

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Stearns, for the defendant, insisted, that as there was no evidence of a demand, there was no proof of a conversion.

Although a wrongful taking is said to be evidence of a conversion, yet, in order to make it such, the taking must be *knowingly* wrongful. But in the present case the defendant had good reason, from the situation of the pews, to suppose that they belonged to Johnson, and therefore was not guilty of a conversion in attaching them. He cited *Cooper* v. *Chitty*, 1 Burr. 31; 2 Wms's Saund. 47 *e*, 47 *f*, note; 3 Dane's Abr. 195; *Solomons* v. *Dawes*, 1 Esp. R. 83; *Bond* v. *Ward*, 7 Mass. R. 127; *Israel* v. *Etheridge*, Bunb. 80; *Tinkler* v. *Poole*, 3 Wils. 146; *S. C.* 5 Burr. 2657; *Bayly* v. *Bunning*, 1 Lev. 173.

Hoar and *Glidden*, *contrà*, cited *M'Combie* v. *Davies*, 6 East, 538; *Baldwin* v. *Cole*, 6 Mod. 212.

April term 1830, at Concord.

PARKER C. J. afterward drew up the opinion of the Court. There is no doubt but that the property in the pannels of the pews was in the plaintiffs. They were to become the property of Johnson only on delivery, and at the delivery they were to be paid for. They were transported to the place of delivery, but were not paid for or delivered, but remained, until the attachment, the property of the plaintiffs.

The attachment was a tortious act, which in itself was a conversion, according to well settled principles of law and uniform practice. Actions against sheriffs, &c. who have attached property not belonging to the debtor, have been either trespass, or trover, or replevin, as the owner might elect; trespass or replevin more frequently than trover, but the latter is quite usual. And what objection can there be to this form of action. It is more advantageous to the officer, in regard to damages, than trespass, and it is less troublesome than replevin. A dictum of Lord *Mansfield*, in 1 Burr. 31, is cited, which is, that if the owner brings trover, he admits that the taking was right-

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ful, and goes only for a subsequent conversion, which must be proved by demand and refusal, or in some other way. This has not been understood to be the law, certainly not in our practice; and it is contrary to the principles laid down in the elementary books. We apprehend that the meaning of Lord *Mansfield* was, not that a tortious taking is not a conversion, but that the plaintiff in such case choosing to bring trover instead of trespass, will have no right to damages for the mere taking; so that if the goods were returned before the commencement of the suit, he can recover nothing, having waived his right to recover for the trespass or mere taking, by the form of his action. And this explanation reconciles cases which otherwise will be contradictory. Upon principle, as well as authority and practice, a tortious taking of another's chattel is a conversion; it is the exercise of an act of ownership, an appropriation of another's property, which is synonymous with conversion.

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In 2 Esp. N. P. 580, the law is laid down thus:— "When the taking of the goods has been tortious, an actual conversion to the party's own use is not necessary to maintain this action." It would have been more correct to say, that where there has been a tortious taking, there has been a conversion. This principle is affirmed in the case of *Tinkler* v. *Poole*, 3 Wils. 146; *S. C.* 5 Burr. 2657; *Chapman* v. *Lamb*, 2 Str. 943.

The objection that the pew pannels were so intermingled with other articles belonging to the debtor, that the officer could not distinguish them, and therefore had a right to take them, and so is not liable to any action,[1] is not sustained by the evidence. They were placed by themselves, and the officer took them at his peril, as in other cases.

Judgment according to verdict.

[1] See *Shumway* v *Rutter*, *ante*, 443.

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JOHN TUFTS *versus* NATHAN ADAMS.

Land granted by A to T with covenants against all incumbrances and of general warranty, was nevertheless subject to a mortgage to C, on which C subsequently recovered the conditional judgment, and obtained possession of the land. While the land continued in T's possession, he mortgaged it for a smaller amount than C's mortgage. After C had thus obtained possession, T brought an action against A for a breach of the above covenants, in which it was *held*; 1. That the covenant against incumbrances was broken when the deed was executed, but that T could only recover nominal damages, as he had not paid any thing to remove the incumbrance. 2. That the covenant of warranty was broken; that T, by his mortgage, had assigned this covenant, to the extent of the sum due on this mortgage, to the mortgagee; that the damages recoverable in this action were the amount of C's judgment for debt and costs, deducting the amount of the mortgage which T had made himself; and that if before judgment T paid off the mortgage made by himself, he could recover in this action the whole amount due to C.

THIS was an action of covenant, on a deed of land made by the defendant to the plaintiff, in which the defendant covenanted, that at the time of the conveyance the premises were free of all incumbrances, and that he would warrant and defend the same to the plaintiff, his heirs and assigns, against the lawful claims and demands of all persons.

The plaintiff alleged as a breach of the first covenant, that at the time of the conveyance the land was subject to a mortgage before that time made by John Harris, a former owner of the land, to Mrs. Esther Clarke, which was outstanding and unpaid. He alleged as a breach of the other covenant, that Mrs. Clarke, in an action brought on her mortgage, recovered at the October term of this Court in 1827, the conditional judgment, that she should have her writ of possession, unless the liquidated amount due on the mortgage should be paid in two months; and he further averred, that the amount was not paid, and that Mrs. Clarke thereupon took out execution on the judgment, and was put into possession of the land under it on January 25, 1828, by which means the plaintiff was evicted.

The defendant pleaded that he had not broken his covenants, upon which issue was joined.

On the trial, before *Morton* J., the plaintiff produced and proved the deed, dated March 19, 1817, containing the covenants declared on. He also offered the record of the condi

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tional judgment recovered by Mrs. Clarke, as stated in the declaration, the amount of the debt being 3323 dollars 3 cents, and costs 74 dollars 48 cents, and also the writ of possession, executed January 25, 1828, by which Mrs. Clarke was put in possession of the land, which she still held, the sum due on the mortgage not having been paid. It was also proved that the plaintiff, after the conveyance to him by the defendant, had made three mortgages by deeds in the usual form, with warranty, which were outstanding and unpaid at the time of the trial, viz. 1. To Elizabeth Ingraham, March 13, 1822, for securing 700 dollars and interest: 2. To Rufus Wyman, August 19, 1825, for 500 dollars and interest: 3. To George B. Lapham, August 24, 1826, for 700 dollars and interest. The plaintiff is liable on his covenant of warranty to each of these mortgagees.

The jury were directed to return a verdict for the plaintiff for the value of the land on January 25, 1828, when Mrs. Clarke's writ of possession was executed. The jury accordingly returned a verdict for 4300 dollars, which was to be subject to the opinion of the Court on the following questions reserved, to wit, *first*, whether, upon the facts, the action would lie upon either of the covenants and the breaches assigned and proved; and if so, *secondly*, what is the measure of damages upon either or both of the breaches. And judgment was to be entered on the verdict, or the verdict was to be set aside and a new trial granted, as the Court might order.

Shaw and *Phinney*, for the defendant. The plaintiff, by his mortgages of the land, assigned the covenants of the defendant to the mortgagees, and therefore has now no interest in them, and can maintain no action for the breach of them. The mortgagees of the plaintiff can now sue the defendant for the breach of the covenant of warranty. *Bickford* v. *Page*, 2 Mass. R. 455. It is true that by paying off these mortgages the plaintiff may entitle himself to sue for the breach of the covenant of warranty, but he cannot sue until he has done so.

Oct. 16th

The taking possession of the land by Mrs. Clarke as mortgagee, is not such an eviction as will enable the plaintiff to maintain this action. *Emerson* v. *Proprietors of Land in Minot*, 1 Mass. R. 464; *Prescott* v. *Trueman*, 4 Mass. R. 631;

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Tufts v. Adams.

Bearce v. *Jackson*, 4 Mass. R. 408; *Gore* v. *Brazier*, 3 Mass. R. 523. Notwithstanding the mortgagee has obtained possession, the plaintiff has not lost the land, which still remains only a security for the mortgage debt. *Goodwin* v. *Richardson*, 11 Mass. R. 469; *Ballard* v. *Carter*, 5 Pick. 112.

The damages for the eviction, if any are recoverable, can be only nominal. Certainly the whole value of the land cannot be recoverable, for if it were, by paying off Mrs. Clarke's mortgage, the plaintiff's title would become good, and he be enabled to pocket the difference between the value of the land and the amount of the mortgage money. *Wyman* v. *Brigden*, 4 Mass. R. 150.

No damages are recoverable on the covenant against incumbrances, for the plaintiff, by assigning to his mortgagees, has given them the right to sue on this covenant. *Sprague* v. *Baker*, 17 Mass. R. 586. At any rate he can only recover nominal damages, until he extinguishes the incumbrance. *Prescott* v. *Trueman*, 4 Mass. R. 627; *Chapel* v. *Bull*, 17 Mass. R. 213; *Wyman* v. *Ballard*, 12 Mass. R. 304.

Hoar and *Tufts*, for the plaintiff. To show that the plaintiff, being liable on the covenants in the mortgages made by him, could maintain an action against the defendant on his covenants, they cited *Niles* v. *Sawtell*, 7 Mass. R. 444.

The opinion of the Court was drawn up by

April term 1830, at Concord.

PARKER C. J. There can be no doubt that the plaintiff is entitled to his action for the breach of the covenant against incumbrances, for the incumbrance existed before the execution of his deed from the defendant, and so the right of action did not pass to the plaintiff's assignee.[1] But for this breach he could recover only nominal damages, it not being averred or proved that he had paid any thing towards relieving the land from the incumbrance.

With regard to the breach assigned, of the covenant of war-

[1] See *Chapman* v. *Holmes*, 5 Halsted, 20; *Mitchell* v. *Warner*, 5 Connect R. 497, *Davis* v. *Lyman*, 6 Connect. R. 249; *Stewart* v. *Drake*, 4 Halsted 139; *Bean* v. *Mayo*, 5 Greenleaf, 94; *Potter* v. *Taylor*, 6 Vermont R. 676; *Richardson* v *Dorr*, 5 Vermont R. 9; *Funk* v. *Voneida*, 11 Serg. & Rawle 109.

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ranty, it is averred and proved that Mrs. Clarke, the mortgagee of John Harris, had obtained the conditional judgment on her mortgage, and, the debt not having been paid, that a writ of *habere facias* had issued, by virtue of which she had been duly put into possession by the officer. This is certainly an eviction, and therefore proves the breach of the covenant of warranty; but it does not necessarily follow, that the damages should 550
be assessed to the value of the land, because the right of redemption is open, and the plaintiff may discharge this incumbrance and restore himself to possession, by paying the debt and the interest and the costs of suit. Indeed, there seems to be no reason why, on such an eviction, which at the election of the plaintiff may be defeated, any more damages should be recovered than will indemnify the plaintiff; for if the whole value of the land should be assessed in damages, the plaintiff might pay the debt secured by the mortgage, and thus hold an indefeasible title; which is all he has a right to exact from the defendant.

It appears reasonable, therefore, that for this breach of the covenant of warranty, the proper rule of damages should be, to give the amount due upon the mortgage, with the costs of the suit upon the mortgage against the plaintiff, and thus he will be enabled to redeem the land from the funds of the defendant. If he should not redeem, but suffer the equity to be fore closed, then, if there shall be any loss, he will have no right to complain.

Thus the case ought to stand, if there had been no conveyance or assignment by the plaintiff of his interest in the land. But he has made three several mortgages; one of which, to Wyman, is discharged, but the others, to Mrs. Ingraham and to Lapham, are outstanding. As these conveyances were made before the defendant's covenant of warranty was broken, that covenant passed with the land to the extent of the sum secured by the mortgage, and if the plaintiff now should recover the whole sum due on Mrs. Clarke's mortgage, Mrs. Ingraham and Lapham may have their actions on the covenant against the defendant, so that he may have to pay twice for the same breach. According to the doctrine in *Wyman* v. *Ballard*, 12 Mass. R. 304, the mortgager of an estate under a previous

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Tufts v. Adams.

incumbrance, may recover the value of the incumbrance, he has been made to pay to his grantee on his covenants. Here being an actual eviction, if he pays off the incumbrance before judgment, why may he not recover a full indemnity, instead of being put to another action?

551 *Note.* It was stated by the plaintiff's counsel at the argument, that the mortgages to Lapham and Mrs. Ingraham had been paid off; and judgment was rendered for 3886 dollars 55 cents, being the amount due on the mortgage of John Harris to Esther Clarke.

ARTEMAS YOUNG *versus* WALTER R. MASON.

Where on a trial a witness is examined respecting a matter which is irrelevant to the issue, by both parties without objection, one of the parties cannot afterward object to the witness's further examination with regard to the same subject.

TRESPASS for taking, carrying away, and destroying two hundred gallons of French brandy. Trial before *Morton* J. on the general issue.

Francis D. Kidder, a witness for the plaintiff, testified that he was a clerk in the store of Mason & Brooks: that the defendant, one of the firm, sold the plaintiff a pipe of brandy at 1 dollar 12 cents a gallon, which he represented to be pure French brandy; that it was charged to the plaintiff on the books of the firm and his name was put on the head of the cask, but that it was left in the store for a few days by the defendant's consent, until the plaintiff should send for it; that before the brandy was removed, the defendant drew out about 40 gallons, and supplied its place by American brandy worth 40 or 50 cents a gallon; and that Brooks, the defendant's partner, was present at the time.

Brooks, being called as a witness for the defendant, contradicted the material parts of Kidder's statement. On cross-examination the plaintiff's counsel inquired of him, whether he, or his partner, ever had, in any instance, adulterated brandy or other spirits. This question he answered in the negative.

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Many questions on this subject were put by the counsel on both sides, the defendant's counsel making no objection to the inquiry. The Court having adjourned to the next day, the plaintiff's counsel, on the opening of the Court, proposed to inquire of the witness, whether in particular cases, which were named, and in sales to certain persons who were then in court 552
as witnesses, the defendant or the witness had not adulterated brandy or other spirits. The defendant's counsel stated that the defendant did not object to the questions, but that he thought them irrelevant and that they ought not to be put or answered. But the judge permitted the plaintiff's counsel to put them and required them to be answered. The defendant's counsel excepted to this decision, and, a verdict having been found for the plaintiff, moved for a new trial for this cause.

T. Fuller, for the defendant, cited 1 Stark. Ev. 134; *Spencely* v. *De Willott*, 7 East, 108; *Rex.* v. *Watson*, 2 Stark. R. 156.

Hoar, for the plaintiff, did not wish to be heard.

Per Curiam. We do not think the defendant entitled to object to the verdict on the ground that improper questions may have been put to a witness, and that he was required to answer them, under the circumstances which occurred at the trial. The defendant would avail himself of a willingness on his part to have the questions put, but would reserve the right to object to them as improper. There was in truth no objection made at the time, and it is now too late to object.

Judgment according to verdict.

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Asa B. Blood, by his next Friend, *versus* Luther Harrington.

In order to establish, on a trial, a title to personal property by purchase, it is not necessary for the purchaser to offer his bill of parcels in evidence; but he may prove his purchase by parol evidence.

If the other party wishes to have the bill of parcels produced on the trial, he should give notice beforehand to the party who has it in his possession.

Where a suit is brought by a minor in his own name, without any guardian or next friend, his infancy may be pleaded in abatement.

But if the infancy of the plaintiff is pleaded in abatement, the court may allow him to amend by inserting in his writ that he sues by A, his next friend.

It seems that the person whose name is so inserted, will be liable for costs from the beginning of the suit, if the defendant prevails.

This was replevin for one hundred and twenty sheep, which had been attached by the defendant in a suit against Jacob Newcomb.

553 At the Common Pleas the defendant pleaded in abatement, that the plaintiff was an infant at the time when the writ was sued out, and had sued in his own name, and not by his guardi an or next friend. The plaintiff did not reply to this plea, but, at a subsequent term, obtained leave to amend by inserting, after his description in the writ, the following words, — "who sues by John Howard of Roxbury in the county of Norfolk, leather-dresser, his next friend."

The writ was indorsed by the plaintiff, and at the second term in the Common Pleas a question was made, whether he was a good indorser, and whether a new one could be sub stituted.

At the trial in the Supreme Court, before *Morton* J., the plaintiff claimed to have purchased the sheep of Luther A. Richards. Parol evidence was produced to prove the sale. In the course of the examination of the witnesses it appeared, that, at the time of the sale, a bill of parcels receipted was given by Richards to the plaintiff. The defendant's counsel then objected to the admission of parol evidence to prove the sale. But no notice had been given to produce this paper. The defendant's counsel contended that the plaintiff used it at the trial in the Common Pleas, and the plaintiff's counsel that the defendant used it. It was used on that trial, but it did not

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appear by which party. The judge overruled the objection, and permitted the plaintiff to proceed with his parol evidence. To this decision the defendant's counsel excepted.

A verdict having been returned for the plaintiff, the defendant moved for a new trial on account of the decision above stated. He also filed a motion in arrest of judgment, or for the dismissal of the action, for the following causes; 1. Because the plaintiff was a minor when the action was brought, and yet sued out the writ in his own name, and not by his guardian or next friend, the name of the next friend having been inserted, against law, after the action had been in court four terms: 2. Because the plea in abatement remained unanswered: 3. Because the plaintiff, being a minor, indorsed the writ: 4. Because the replevin bond, which was signed by the plaintiff as principal, was insufficient on account of his being a minor, and therefore the service was unlawful. 554

T. Fuller and *J. Russell* for the defendant. The plaintiff was bound to produce the bill of sale, as the best evidence of his title. 3 Stark. Ev. 1002; *Wood* v. *Morris*, 12 East, 237; *Rolleston* v. *Hibberts*, 3 T. R. 406. *Jan. 20th, 1830, in Suffolk.*

The action ought to be dismissed, because the Common Pleas gave the plaintiff leave to amend after the plea in abatement; because the replevin bond, which is essential to support the action, was void on account of the plaintiff's minority;[1] and because the writ was indorsed by a minor. *Cady* v. *Eggleston*, 11 Mass. R. 282; *Moore* v. *Parker*, 3 Mass. R. 310. As only one plea in abatement was allowable, it is not now too late to take advantage of the other objections, on this motion.

The plaintiff could not get into court except by his next friend. He could not appear by attorney. *Stone* v. *March*, Cro. Jac. 580; *S. C.* Bulst. 24; 1 Co. Lit. 135 *b*, and Hargr. note 220.

Hoar and *Brooks*, *contrà*, contended that the plaintiff was not bound to produce the bill of parcels at the trial, as it formed no part of his title to the property. 3 Stark. Ev. 1054. The bill of parcels is not necessarily evidence between

[1] See *Conn* v. *Coburn*, 7 N. Hamp. R. 368.

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Blood v. Harrington.

these parties, as it is the mere declaration, not under oath, of a third person.

Infancy must be pleaded in abatement; and if it is not, judgment cannot be stayed for that cause. When the defendant pleaded in chief, he waived his plea in abatement. *St.* 21, *Jac.* 1, *c.* 13, § 2, cited in 2 Saund. 212, note; *Schemerhorn* v. *Jenkins*, 7 Johns. R. 373; *Cowne* v. *Bowles*, 1 Salk. 93, 205.

Fuller, in reply, said that the plea in abatement was not waived, but it was overruled by the amendment allowed by the Court of Common Pleas, from which the defendant could not appeal, it being but an interlocutory order.

April term 1830, *at Concord.*

PARKER C. J. afterward drew up the opinion of the Court. The bill of parcels was not essential to the plaintiff's recovery. It generally amounts to nothing more than a receipt for the price. The purchase may undoubtedly be proved without it. If however it is wanted by the adverse party, to be used by him as evidence, it ought to be produced, if it is in the possession of the plaintiff or if it belongs to him, but, like other papers which are not essential to the plaintiff's case, notice to produce it should be given to him. In this case the original bill of parcels was used on the trial at the Court of Common pleas, but it does not appear by which party. It is undoubtedly on the files of the clerk. It is made the defendant's duty, on an appeal by him, to bring up the copies; and if he wants the original of any particular paper, he should procure it from the files, by leave of court, if that is necessary. It is as much within his, as the other party's control. There is no ground for a new trial on this point.

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With regard to the suit's having been commenced by the plaintiff while a minor, without the intervention of a *prochein ami*, it might have been pleaded in abatement.[1] The admission of the *prochein ami* by way of amendment, we think, removes the objection. He is answerable for costs from the beginning, and the judgment will stand correct.

Motion for new trial overruled.

[1] See *Young* v. *Young*, 3 N. Hamp. R. 345; *Smith* v. *Van Houten*, 4 Halsted, 381; *Smith* v. *Minor*, Coxe, (N. Jers.) 416.

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JEREMIAH GORE *versus* JOHN P. CLISBY, Principal, and JOHN BISHOP Junior, Trustee.

Neither choses in action nor land assigned, are, in the hands of the assignee, goods, effects, or credits of the assignor liable to the trustee process; even in case the assignee would be trustee after receiving money by means of the choses in action, or as the proceeds of the sale of the land.

A debtor assigned goods, choses in action, and land, to an assignee, for the benefit of creditors. After some of the creditors had become parties to the assignment, the assignee was summoned as trustee of the debtor, before money was collected on any of the choses in action, or the land was sold. The goods were not sufficient to pay the debts of those creditors who had become parties before the writ was served, but the proceeds of the whole funds, including the choses in action and the land, would be more than sufficient. The court refused to direct the trustee to pay the creditors who had signed, out of the proceeds of the choses in action, and the land in the first place, and thus leave a part of the goods to be held by the trustee process, and discharged the trustee.

FROM the answers of Bishop it appeared, that on November 19, 1828, the defendant assigned to him certain real and personal estate, and certain demands, to secure the amount due from the defendant to Bishop and to indemnify him against 556
certain liabilities, and to pay George B. Lapham and John Clough certain demands and liabilities, and the residue to be divided among the defendant's other creditors. At the time of the service of the writ on Bishop, the indenture of assignment had been executed by the defendant, and by Bishop, Lapham, and Clough, and no one else. The total value of the real estate conveyed was 1965 dollars; the proceeds of the sales of the personal property were 7905 dollars; the amount of the assigned demands which were considered good, was 3736 dollars, besides a larger amount of demands which were considered bad or of little value. At the time of the service of the writ, none of the demands had been collected, but before Bishop's last answer he had collected 1001 dollars. The amount of the demands and liabilities of Bishop, Lapham, and Clough secured by the assignment, was 7701 dollars, exclusive of interest. The supposed expenses of executing the trust were 500 dollars.

The question was, whether Bishop should be adjudged trustee.

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Gore v. Wisby & Tr.

April term 1830, at Concord.

The case was argued at Boston, January 20th, 1830, by *I. Fiske*, for the plaintiff, and *Rand*, for the trustee.

PARKER C. J. afterward drew up the opinion of the Court. It appears by the disclosure of the respondent, that the property assigned to him by the indenture (the validity of which has been established heretofore) is insufficient to satisfy the debt due to, and the liabilities incurred by him, and the debts due to Lapham and Clough, who had become parties to the indenture before the service of the writ, unless he is chargeable on account of choses in action not reduced to money at the time of the service of the writ, or on account of real estate assigned to him in trust for the purposes mentioned in the indenture.

In regard to the choses in action, it has been frequently decided that they do not render an assignee liable as trustee ;[1] and in the late case of *Lupton* v. *Cutter & Trustees*, *ante*, *p.* 298, it was decided, that although there were goods and debts assigned, which together would exceed the amount of claims of those creditors secured by the assignment, who had become parties thereto before the attachment, yet that there could not
557 be such a marshalling of the effects, as would entitle an attaching creditor under the trustee process to hold, upon the contingency that there might eventually be a surplus.

In regard to real estate conveyed in trust for like purposes, while it remains undisposed of, the question has never been directly adjudicated.

It has been supposed at the bar, that in the case of *Webb* v. *Peele*, 7 Pick. 247, the general principle was settled, that an assignee of real estate in trust for creditors, might be held as trustee under this process, if the value of the property assigned should exceed the claims of those creditors who had become parties before the service of the trustee writ ; but it certainly was not the intention of the Court so to decide, and we think the case as reported affords no ground for the supposition. In that case the conveyance of the real estate to Peele and others was absolute and unconditional. They were in fact the purchasers ; and the only question submitted to the Court was, whether they should be held to account for the price or pur-

[1] See *ante*, 304, note 2.

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chase money according to the nominal consideration in the deed, or at the actual value of the estate at the time it was conveyed. It was necessary to know how much of the debts due to Peele and his associates was paid by the land, in order to ascertain whether the personal property assigned would exceed the amount of the debts. It is stated in the opinion of the Court, that the land being conveyed absolutely, it was to be considered as payment *pro tanto*.

The conveyance of real estate in the present case, as appears by the answers, was not intended as an absolute conveyance, but with the personal estate was to be a fund out of which the debts provided for in the indenture were to be paid. The difference in the two cases is essential. In the case of *Webb* v. *Peele*, the title passed to the grantees and the estate vested in them as tenants in common, in proportion to their several debts. In the present case, though the legal title vested in Bishop the trustee, yet he held the land as agent for the creditors generally, and he was to account to them for the proceeds on a sale. It was not intended by either party, that the land should be considered as payment, but as the means of creating a fund from which to pay the creditors proportionally.

Now there are great difficulties in charging the assignee by the trustee process, on account of the real estate so conveyed. Indeed the provisions of the statute cannot be executed upon it, according to the intentions of the legislature, nor can real property thus situated be brought within any technical definition of the words of the statute which designate the objects of the process. Land is neither goods, effects, nor credits ; neither is the assignee indebted to the assignor on account of it. If this difficulty could be overcome by giving a broader signification to the term *effects* than is usually assigned to it, there are other difficulties which are quite insuperable. The sixth section of the statute provides, that the trustee, when judgment is rendered against the principal, and against his goods and effects in the hands of the trustee, may discharge himself by exposing the goods and effects of the principal to the officer who has the execution ; and the officer may then seize and sell them as the property of the principal. This is wholly inapplicable to land ;

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Gore v. Clisby & Tr.

which cannot be considered as the principal's while the legal title is in the assignee. And then the form of the execution provided in the statute manifestly shows that real estate was not in the contemplation of the legislature, as a subject of the process. It requires the sheriff, for want of goods, chattels or *lands* of the principal in his own hands and possession, or of *goods*, *effects* and *credits* in the hands of the trustees, to be by them discovered and exposed, to take the body of the principal, &c. Now land conveyed to the assignee by a *bona fide* deed, cannot be considered as in the hands or possession of the principal, nor can it be considered as goods, effects or credits in the hands of the trustee. Then again, in the same section, it is most obvious that nothing but personal property and credits were within the view of the legislature, the whole scope of the provisions necessarily excluding land from their operation.

It may be said that, upon this construction of the statute, there is danger of creditors being deprived of the right of having their debts satisfied out of the estate of the debtor, although he may have sufficient to discharge them. Without doubt there are difficulties, which perhaps nothing short of legislative power can remove, though they may not be so great as is im-
559 agined. The property assigned, real and personal, must all be converted into money to satisfy the purposes of the assignment, and if there is a surplus, the assignees are answerable on the trustee process, to creditors not parties to the assignment. If they should delay unreasonably to sell the land, and other property assigned, this may be evidence of fraud, and the land may be attached or levied upon as the debtor's. The creditors provided for in the assignment will be vigilant in instigating the trustee to his duty, and may compel him to execute it by chancery process, he holding in trust for them, and this gives some security to the creditors not provided for.

But still, perhaps a perfect administration of justice in such cases requires, if this system of partial assignments is to be continued, that authority should be given to creditors who are unprovided for, to apply by bill in equity for a speedy execution of such trusts, by a sale of the property within a limited time, and a distribution of the surplus, if there should be any, after satisfying the debts provided for, among the other credit-

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ois A process of this nature, authorized by legislative enactment, would subject the whole fund to the superintendence of the court, who would then, after providing for the execution of the trusts in favor of such creditors as had acquired a right to preference by the terms of the assignment, cause the residue of the property to be distributed among such creditors as should come in upon notice and make themselves parties to the bill. This would be an approach towards justice, which, under our existing laws in relation to attachments and assignments, there is reason to fear is not always obtained. When land is conveyed by the debtor to trustees for the benefit of creditors, if there is fraud, the remedy is open at common law; if no fraud exists, the fund cannot be reached by the trustee process, until it is converted into money, unless we should adopt the chancery practice of marshalling; which, for reasons given in the case before cited of *Lupton* v. *Cutter & Trustees*,[1] we think cannot be done. It remains for the legislature to give such further remedy to creditors as the existing state of our laws seems to require.

Trustee discharged.[2]

THOMAS J. MAXWELL, Petitioner &c., *versus* LUCY HARDY. 560

The mother of a bastard child is a competent witness on a complaint for the maintenance of the child, under the statute of 1785, *c.* 66, § 2, although, during her pregnancy and previously to her examination before the justice of the peace, she declares that the person whom she subsequently accuses in the time of her travail, is not the father of the child with which she is pregnant; it is sufficient, if she continues constant in her accusation from the time of her examination before the justice.

Her previous declaration is an objection to her credit only, not to her competency.

THIS was a petition for a *certiorari* to the Court of Common Pleas, in the case of a complaint against the petitioner under *St.* 1785, *c.* 66, for the maintenance of the complainant

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[1] *Ante*, 298; and see notes to that case.

[2] See *Tucker* v. *Clisby*, 12 Pick. 22; *Bissell* v. *Strong*, 9 Pick. 562; *Sanford* v. *Bliss*, 12 Pick. 116.

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Maxwel v. Hardy.

Hardy's bastard child, born October 19, 1828, of which the complaint alleged Maxwell to be the father. The general issue was joined in the Common Pleas, on the trial of which, before *Cummins* J., the complainant read in evidence her voluntary examination and accusation of Maxwell, taken by a justice of the peace on August 25, 1828. She then proved, that, in the time of her travail, she accused Maxwell of being the father of her child; and then offered herself as a witness to testify to the same fact before the jury.

Maxwell then offered to prove, that the complainant, in July or August, 1828, and before her examination, had expressly declared, that if she was pregnant, Maxwell was not the father of the child; and he moved the Court, that on receiving this evidence, her testimony should be rejected, on the ground that she had not remained constant in her accusation.

But the judge overruled the motion, and refused to admit this evidence, on the ground, that the proof, if satisfactory, of the complainant's declaration at the time alleged, would not render her an incompetent witness in the case; and he said that Maxwell might offer the evidence to affect her credibility.

The complainant was received as a witness, and Maxwell was found guilty.

Maxwell excepted to the opinion and order of the judge, rejecting the evidence offered by him, and admitting the complainant as a witness.

561 *Jan. 20th, 1830, in Suffolk.*

Hoar, for the petitioner, cited *St.* 1785, *c.* 66, § 2, which provides for this prosecution and makes the mother of the bastard child a witness, in case she "shall accuse any man of being the father thereof before any justice of the peace, upon examination on oath, and being put upon the discovery of the truth respecting the same accusation in the time of her travail, shall thereupon accuse the same person of being the father of the child of which she is about to be delivered, and shall *continue constant in such accusation*," &c. He contended that the complainant had not continued constant in her accusation, as required by the statute, which means, that she must continue constant during the whole time of her pregnancy, or while she is conscious of her pregnancy, and therefore that she was not a competent witness. This statute, which makes a party a

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witness, against the common principles of right, has always been construed strictly. *Commonwealth* v. *Cole*, 5 Mass. R. 517; *Bacon* v. *Harrington*, 5 Pick. 63. Maxwell v. Hardy.

Keyes, *contrà*, cited *Judson* v. *Blanchard*, 4 Connect. R. 557; *Davis* v. *Salisbury*, 1 Day, 278; *Wormstead's case*, 2 Dane's Abr. 517; *R. R.* v. *J. M.* 3 N. Hamp. R. 135.

PARKER C. J. afterward drew up the opinion of the Court. *April term 1830, at Concord*

We think it exceedingly clear, that the decision of the Court of Common Pleas was right; whether we refer to the words of the statute on which the prosecution is founded, or the reason of the thing, in relation to the probable intent of the legislature.

The general object was to give competency to a witness who by the general rule of evidence would be excluded as interested, in a case in which, without such evidence, the mischief intended to be cured would be irremediable. The danger of such evidence was not overlooked by the legislature, and was intended to be guarded against by placing the witness in such circumstances at the time of her accusation, as would in all probability insure her veracity. In the time of her utmost peril, with the fear of death and judgment before her eyes, it was wisely thought that a false accusation would rarely if ever be made; upon the same principle, that the declaration of a person *in extremis*, which may affect the life of a party accused of murder, are admitted, though not under the sanction of an oath. And as a further security for the truth of the accusation, the witness is to continue constant in the charge to the time of her examination on oath before the magistrate. These solemnities are essential to her competency, and if they fail, she is not to be admitted to her oath on the trial. But if it appears, that being put upon the discovery of the truth at the time of her travail, she accused the same person against whom she complains under oath before the magistrate, and that she has continued constant in her accusation, she is to be admitted as a witness, and her credibility left to the jury. The constancy required to make her competent, is evidently intended to be from the time she has made the accusation in either of the above solemn forms. Any previous charge upon another person, or denial of illicit commerce with him who is afterward charged as the 562

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Maxwell v. Hardy.

putative father, may be properly shown, to affect her credit with the jury, but does not destroy her competency, because they admit of explanation, and may appear to be the result of terror or shame for her condition, or to have been produced by the threats or blandishments of her seducer.

We find this exposition of the statute to have been given by this Court in the case of *Drowne* v. *Stimpson*, 2 Mass. R. 441. The other cases cited by the counsel for the petitioner do not touch the point.

In Connecticut and New Hampshire the courts have given the same construction to their statutes on the same subject. 4 Connect. R. 557; 3 N. Hamp. R. 135. Indeed, we think it very clear from the words of the statute and the obvious intent of the legislature.[1]

Petition dismissed.

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563 The Inhabitants of ASHBY *versus* The Inhabitants of LUNENBURG.

In an action by one town against another to recover expenses incurred in the support of a pauper, a notice signed by A and B as selectmen, they being overseers of the poor, by virtue of their office of selectmen, was held sufficient.

ASSUMPSIT to recover expenses incurred in the support of Abel Stearns and his family, who were paupers. Plea, *non assumpsit*.

At the trial in the Court of Common Pleas, before Strong J., the plaintiffs, in order to prove that it had been duly notified to the defendants that the paupers had become chargeable to the town of Ashby, produced a notice signed by two of the selectmen of Ashby *as selectmen*, with evidence that it had been duly sent to the overseers of Lunenburg. No answer was returned. This notification was objected to by the defendants; and the court ruled that it was insufficient and or-

[1] See *Dennett* v. *Kneeland*, 6 Greenleaf, 460; *Tillson* v. *Bowley*, 8 Greenleaf, 163; *Stiles* v. *Eastman*, 21 Pick. 132; *M'Managil* v. *Ross*, 20 Pick. 99. Revised Stat. *c.* 49, § 3; *Warner* v. *Willey*, 2 Root, 490.

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dered a nonsuit; whereupon the plaintiff's filed their exceptions. Ashby v. Lunenburg

It was admitted at the argument, that no overseers had been chosen by the town of Ashby at the time when the notice was given.

Hoar, for the defendants, cited *Dalton* v. *Hinsdale*, 6 Mass. R. 501. *Jan. 20th, 1830, in Suffolk.*

Stearns and *John Locke*, for the plaintiffs, cited *Powers* v. *Ware*, 2 Pick. 451; *Garland* v. *Brewer*, 3 Greenl. 197.

PARKER C. J. afterward drew up the opinion of the Court. *April term 1830, at Concord*

The only question is on the sufficiency of the notice; and the objection is, that it does not appear to have been given by the overseers of Ashby. It is in all respects sufficiently particular; but it is signed by the selectmen *as such*, not stating the capacity of overseers, in which they acted. By statute, they, as selectmen, there being no other persons chosen for the office, were overseers, *virtute officii*. So that the objection is not to their want of authority, but to their not having denominated themselves overseers, in their letter of notice.

As it is by a general law, that the duty of overseers is devolved upon the selectmen, when no persons are specially designated to that office, the overseers of Lunenburg cannot 564 pretend ignorance of it; and we think, that having received notice of a matter relating to the poor, signed by persons calling themselves selectmen, they ought to have presumed they were acting in the capacity of overseers.

The case of *Dalton* v. *Hinsdale* refers only to cases where there are overseers; and only requires that the notice should come from them, or an agent appointed by them.

The case of *Powers* v. *Ware*, is very strong in support of the ground taken by the plaintiffs, that selectmen having authority as overseers, may be bound in the latter capacity, without naming themselves as such.

The case of *Garland* v. *Brewer* is directly in point.

Judgment of C. C. P. reversed.[1]

[1] See *Rowe* v. *Beale*, 15 Pick. 125; *Dover* v. *Deer Island*, 15 Maine R. (3 Shepley,) 169.

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ABATEMENT.

Where a suit is brought by a minor in his own name, without any guardian or next friend, his infancy may be pleaded in abatement. *Blood* v. *Harrington.* 552

ACTION.

1. If A's personal property is attached in a suit against B, and A sells and assigns his property to a third person while it is under attachment, an action of trespass for the benefit of the vendee, against the attaching officer, is properly brought in the name of A. *Holly* v. *Huggeford.* 73
2. A subsequent attaching creditor being admitted, under the statute of 1823, *c.* 142, to defend against the first attaching creditor, is not confined to the grounds of defence of which the debtor might have availed himself, the object of the statute being to prevent collusion between the first attacher and the debtor. *Carter* v. *Gregory.* 165

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AMENDMENT.

1. *It seems* that an amendment by filing a new count for the same cause of action contained in the original writ, will not discharge bail from their responsibility. *Per Wilde J. Miller* v. *Clark.* 412
2. Where a sheriff attaches goods upon an original writ and delivers them to a bailee upon his engaging to redeliver them on demand, such an amendment does not discharge the bailee from his responsibility to the sheriff. *Ibid.*
3. A verdict in this Court may be amended by the judge's notes, after error brought and joinder in error. *Clark* v. *Lamb.* 415

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4. Where three counts alleged a promise to the plaintiff as executor and a fourth a promise to the testator, all being for the same cause of action, and the defendant pleaded to the three first, that the action did not accrue to the plaintiff within six years, and to the fourth, that the action did not accrue to the testator within six years, and the jury found for the plaintiff upon the first issue, saying nothing about the other, the plaintiff was allowed, after error brought, to amend the verdict by the judge's notes, upon payment of costs. *Ibid.*

5. A special verdict cannot be amended by the minutes of the judge, without the consent of both parties. *Walker* v. *Dewing.* 520

6 But with such consent it may be so amended. *Semble.* *Ibid.*

7 If the infancy of the plaintiff is pleaded in abatement, the court may allow him to amend by inserting in the writ, that he sues by A, his next friend. *Blood* v. *Harrington.* 552

8 *It seems* that the person whose name is so inserted, will be liable for costs from the beginning of the suit, if the defendant prevails. *Ibid.*

See MILITIA, 2.
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1 In a trustee process, where the defendant is defaulted in the Common Pleas, and judgment is given charging the trustee upon his answers, the trustee may *appeal* from the judgment against him to this Court. *Richards* v. *Allen and Tr.* 405

2. An appeal lies in a personal action commenced in the Common Pleas, where the *ad damnum* is laid at more than 100 dollars, although the demand set out in the writ be for less than that sum. *Chamberlain* v. *Cochran.* 522

ASSIGNMENT.

1. In an indenture of assignment and release between a debtor and his creditors, the property assigned was described as a quantity of certain kinds of goods in the hands of divers persons named, and it was provided that a schedule of the property should be made out and annexed to the instrument "as soon as may be." *Held*, that annexing a schedule was not a condition precedent to the operation of the release; and that omitting to annex it did not make the assignment void or defeat the release, though the provision might amount to a covenant that the debtor would, whenever it should be required, make out and annex such schedule. *Emerson* v. *Knower.* 63

2. A suit in equity lies against persons to whom a debtor has assigned his property for the benefit of his creditors, by a creditor to whom the assignees refuse to pay his dividend. *New England Bank* v *Lewis.* 113

3. If the assignee, having sufficient funds to pay the creditors preferred in the assignment, exhausts the funds by payments to other creditors whose claims are not preferred, leaving one of the preferred creditors unpaid, he is liable to pay such preferred creditor the amount of his demand, even if the misappropriation was made inadvertently *Ibid.*

4. Creditors, for whose benefit an assignment is made by a debtor, are entitled to claim dividends under it, without becoming parties to it or signifying their assent to it, when the instrument itself does not require any signature or assent on their part; and they cannot be deprived of their rights under the assignment, without a refusal or waiver of their claim under it. *Ibid.*

5. A creditor's prosecuting a suit at

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law against the debtor, on which he had made an attachment, to final judgment, is not evidence of such a waiver. *Ibid.*

6 *It seems*, that the mere declining of the president of a bank, which is one of the preferred creditors in an assignment, to become a party to the instrument, is not alone sufficient evidence of a refusal of the bank o accept the assignment. *Ibid.*

See BILL OF EXCHANGE, &c. 14.
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MORTGAGE, 5, 6.
RELEASE, 3.
TRUSTEE PROCESS, 3, 4, 5, 6, 10, 11, 13, 14, 15, 17, 18.

ASSUMPSIT.

A advanced money on the outward cargo of a vessel bound to Hamburg, the cargo, for his security, being shipped in his name, though really belonging to B & C, the owners of the vessel. The cargo was sold at Hamburg by the agents of the owners. The ship sailed for Russia, and there took in a return cargo, which was shipped by D & Co. the agents of B & C, and paid for out of the proceeds of the outward cargo which they had received from Hamburg. D & Co. took from E, the master, bills of lading in which the cargo was to be delivered to order or assigns, and no freight was specified. D & Co. indorsed the bills of lading to A and transmitted them to him. But E did not know that they had been so indorsed. During the voyage home the vessel was forced to put into Copenhagen, and seven bundles of hemp were taken out, which, as it could not be restowed, was left by E with merchants there, with orders to have it sold, and the proceeds sent to London to the credit of B the principal owner. The proceeds were accordingly remitted and received by B, who failed before the ship returned to the United States, but whose failure was not known to the master at the time when he gave these orders. In an action brought by A against E for money had and received to recover the proceeds of the hemp, *held*, that E, not knowing of A's interest in the cargo, was justified in directing the proceeds of the hemp to be credited to B; and that the action could not be maintained. *Low* v. *De Wolf*. 101

See BILL OF EXCHANGE, &c. 9
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ATTACHMENT.

1. An officer went on board a ship with a writ, in order to attach goods as the property of a consignee, and the goods being in the lower hold covered up with other goods, he did not go below or see the goods, but paid the freight to the master, and left a keeper to take charge of the goods as attached, and returned on the writ, that he attached them at the time when he went on board. The keeper continued on board several days and took possession of the goods when they were hoisted from the hold. It *seems*, that in point of form the proceedings of the officer and his keeper, constituted a valid attachment of the goods. *Naylor* v. *Dennie*. 198
2. It is a sufficient attachment of hay in a barn, for the officer to go within view of it, declare that he attaches it, and post on the barn-door a notification of the attachment. *Merrill* v. *Sawyer*. 397
3. Where the person appointed by a sheriff to take custody of personal property attached, abandons it, and it comes into the possession of an adverse claimant, the lien created by the attachment is lost. *Carrington* v. *Smith*. 419

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4. A mortgage was made of a factory and certain machinery "in preparation soon to be placed there," but no possession of the property was taken at the time, and the mortgager still continued to occupy the factory. The machinery was afterwards attached in the factory, in a suit against the mortgager, and a person at the factory was appointed by the attaching officer to take charge of the machinery attached. This person subsequently absconded, and the mortgagee took possession of the mortgaged property, real and personal, including what had been attached. An execution having issued in the suit in which the attachment was made, the attaching officer took the machinery out of the possession of the mortagee, and sold it on the execution. *Held*, that the possession of the machinery taken by the mortgagee perfected his title under the mortgage; that at the time the officer took the machinery on execution, he had lost the lien created by his attachment; and that the mortgagee might maintain trespass against the officer. *Ibid.*

5. Where a town-house was erected on land of the town under a contract with the builder that the town should occupy part of it at a certain rent, and should have the right to purchase the house at an appraised value, it was *held* that the house was the personal property of the builder, but that an attachment of it in the manner in which real estate is attached, no actual possession being taken by the officer, was valid. *Ashmun* v. *Williams*. 402

6 Where the owner of chattels suffers them to be mixed with those of another person, so that they cannot be distinguished, an officer will not be liable to an action of trespass (nor, *it seems*, to any action) for attaching them as the property of such other person. *Shumway* v. *Rutter*. 443

7. But if, after the attachment, such owner points out his goods to the officer and demands a redelivery of them, and the officer notwithstanding sells them, the sale will be a conversion. *Ibid.*

8. If such owner exhibits to the officer a bill of sale of articles of the same kind with others attached by him, with which they were intermixed so as to be undistinguishable, the officer will be justified if he selects and gives up the least valuable articles corresponding with the bill of sale. *Ibid*

See ACTION, 1.
SALE, 5.
STOPPAGE IN TRANSITU, 2.
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The expression "power of attorney" implies a power under seal. *Cutler* v. *Haven*. 490

See COSTS, 1, 3.

BAIL.

A person having become bail in another State in the Union, may take the principal in this State. *Commonwealth* v. *Brickett*. 138

See AMENDMENT, 1.

BASTARD.

1. The mother of a bastard child is a competent witness on a complaint for the maintenance of the child, under the statute of 1785, *c.* 66, § 2, although, during her pregnancy and previously to her examination before a justice of the peace, she declares that the person whom she subsequently accuses in the time of her travail, is not the father of the child with which she is pregnant; it is sufficient, if she continues constant in her accusation from the time of her examination before the justice *Maxwell* v *Hardy*. 55

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2 Her previous declaration is an objection to her credit only, not to her competency. *Ibid.*

BETTERMENTS.

See PARTITION.

BILL OF EXCHANGE AND PROMISSORY NOTE.

1 Where I, an indorser of a protested bill, after having had sufficient opportunity to ascertain the circumstances of the presentment, protest, and notice, promised M, a subsequent indorser, who had taken up the bill, to repay him, and afterwards received the bill from M, proved it in his own name against the estate of the drawees who had failed, and received a dividend upon it, and retained the bill; it was *held*, that I was liable on this promise to repay M, unless he could prove that his promise was made under a mistake of the facts. *Martin* v. *Ingersoll.* 1

2. During the Christmas holydays vessels are not allowed to clear out at the Havana; *it seems*, therefore, that during the continuance of the holydays, it is not necessary to write a notice of the dishonor of a bill, to be sent to a foreign port. *Ibid.*

3. The maker of a note, who has been committed to jail on execution on a judgment in favor of the holder, but has not paid the note, is still liable to be sued by an indorser who pays the amount of the note to the holder; and the suit of the indorser may be brought while the maker is still in jail in the prior suit. *Cole* v. *Cushing* 48

4 An action for money had and received may be maintained by the indorsee of a note against the maker, although the note was signed by the maker merely for the accommodation of the payee, and the maker never received either money or any other consideration for signing it. *Ibid*

5. Where the holder of a note with several indorsers in blank, sues the maker and writes over the name of the first indorser an order to pay it to himself, the holder, but without striking out the names of the subsequent indorsers, he does not thereby discharge them; and therefore one of them who pays the amount of the note to the holder, may sue any of the prior parties. *Ibid.*

6. A bill of exchange, which was indorsed by C of New Orleans, and was payable in Boston, was owned by T of New York. The bill was dishonored by non-acceptance August 11th, and H, who was T's agent at Boston, wrote to T by mail the same day, informing him of the dishonor of the bill. T, by an answer dated August 13th, requested H to give the notices. H accordingly had the notice to C put into the mail at Boston, August 19th *Held*, that the notice was not seasonable, even if T was justifiable in sending to H, instead of sending notice himself directly from New York to New Orleans. *Talbot* v. *Clark.* 51

7. It *seems*, that T was bound to send notice direct from New York to New Orleans. *Ibid.*

8. In an action by the holder of a bill of exchange against an indorser, a subsequent indorser is not a competent witness to charge the defendant, without a release from the plaintiff. *Ibid.*

9. The defendant, a merchant in this country, directs the plaintiff, his correspondent in England, to purchase goods and to draw for the price on a banker in London; who also authorizes the plaintiff to draw. The plaintiff, having similar orders from other persons, purchases goods in his own name for them and for the defendant indiscriminately. On the 30th of July he draws a bill in

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his own name at three months, payable on account of the defendant. The bill is drawn on account generally, in payment for several parcels of goods, and not in payment for goods purchased for the defendant; the defendant however being indebted to the plaintiff to the amount of the bill for goods already sent to him. The banker accepts the bill, having then in his hands only a small balance due to the defendant, but in September he receives funds beyond the amount of the bill. A few days before the 2d of November, when the bill falls due, the acceptor becomes a bankrupt. On the 26th of November a stranger, through mistake, pays the bill for the honor of a person not a party, claiming however to hold the plaintiff and all the other parties, but no notice of the dishonor is given to the plaintiff. Afterwards the person who paid the bill recovers judgment against the plaintiff upon a default by consent. In an action by the plaintiff against the defendant to recover the price of the goods, it was *held*, that the plaintiff, having had reason to expect that the bill would be paid by the drawee, was entitled to notice of its dishonor; that he could not waive notice to the prejudice of the defendant; and that the action could not be maintained. *Grosvenor* v. *Stone*. 79

10. A judgment in an action against the indorser of a note, in his favor, on a verdict which was rendered on the ground that the action had been brought before notice was given to him, is no bar to another action commenced after notice was given; and consequently such judgment is no bar to a suit in equity brought against the indorser and the assignees of his property, in order to enable the plaintiff to obtain the benefit of the assignment. *New England Bank* v. *Lewis*. 113

11. Where a note is made by A payable to B, and indorsed by C at the time it is made, C becomes a promisor on the note, and may be declared against as such. *Baker* v *Briggs*. 122

12. It *seems*, that from the form of the note, without any other evidence, C will be regarded as surety to A. *Ibid.*

13. In an action by B against C as a promisor of such a note, the declarations and admissions of A are not admissible against C, for A is himself a competent witness. *Ibid.*

14. A bill of exchange was drawn in Boston, by J. R. B. on H. & Co. of Richmond, who accepted it for the accommodation of the drawer, and on his engagement to place funds in New York, where the bill was payable, to meet it at its maturity. The bill was indorsed by the plaintiff, also for the accommodation of the drawer, with a knowledge of all the circumstances, and he advised the drawer to adopt this mode of raising money. The drawer having failed and assigned his property for the benefit of his creditors, before the bill became payable, it was dishonored and returned to Boston, where it had been discounted for the drawer, and where the plaintiff took it up as indorser. The assignment provided for indemnifying the plaintiff against all indorsements made by him on account of the drawer, and there were funds in the hands of the assignees to which he could resort for the payment of the bill. *Held*, that the acceptors were exonerated, and that the holders must resort to the funds in the hands of the assignees, for payment of the bill *Bradford* v. *Hubbard*. 155

15. *Held*, also, that the recovery by the acceptors, in a process of foreign attachment commenced for their indemnity, of a sum of money due to the drawer, but which was

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subject in their hands to the control of a court of equity in Virginia, did not affect the case. *Ibid.*

16. A covenant by the payee of a promissory note not to sue the maker within a limited time, cannot be pleaded in bar to an action brought withir the time by a person to whom the note was indorsed after it became due. *Perkins* v. *Gilman.* 229

17. Two notes dated in October and falling due in January and February following, were indorsed by the defendant, who was an Englishman, a master mariner and an unmarried man, having no home in this country, and, when in England, residing in Liverpool. On the 12th of December he wrote from Boston to the holder at Providence, that he should leave Boston in a day or two for Liverpool, but in fact he remained in Boston till the middle of March. The holder did not know of this fact nor of his residing in Liverpool, and sent no notice to him of the dishonor of the bill; neither did it appear that the holder made any inquiries for his residence. *Held*, that due diligence had not been used to give notice to the indorser. *Hodges* v. *Galt.* 251

18. A promissory note given to a creditor, is not payment of the previous debt, where it is not intended as such by the parties. *Watkins* v. *Hill.* 522

See DAMAGES, 1.
EVIDENCE, 6.
GUARANTY, 2, 3.
INSOLVENT LAW, 2, 5.
LIMITATIONS, STATUTE OF, 8, 9, 10.
MORTGAGE, 12, 13.
PRINCIPAL AND SURETY, 6.
TRUSTEE PROCESS, 9.
USURY.

BILL OF LADING.

By a bill of lading expressing that goods are to be carried from one port to another, a direct voyage is *primâ facie* intended; but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper, that such a course is to be pursued. *Lowry* v. *Russell.* 360

See INSURANCE, 10, 11

BOND.

Where a son made a bond to his father, reciting that the father had conveyed certain land to the son, and conditioned, among other things, to pay all the father's debts existing at the time of making the bond, and on the decease of the father his estate was declared, and eventually proved, to be insolvent; and the holder of a note of the father dated prior to the bond, presented the same to the commissioners, by whom it was rejected as a debt which the son was bound to pay, and the holder of the note neglected to prosecute the same against the estate by a suit according to the provisions of the statute in such case; it was *held*, that the administrator might maintain a suit on the bond for the benefit of the holder of the note. *Waters* v. *Eddy.* 399

See ESTOPPEL.
EXECUTOR, &c. 13, 14.
PARISH, 3.
PROBATE BOND.

BOSTON.

See WAY, 1, 2.

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The window of a dwellinghouse being covered with a netting of double twine nailed to the sides, top and bottom, it was *held*, that cutting and tearing down the netting and entering the house through the window, were a sufficient breaking and entry to constitute burglary. *Commonwealth* v. *Stephenson.* 354

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BY-LAW.

See INSURANCE COMPANY, 1, 3.

CANAL.

See WAY, 7.

CERTIORARI.

See VOLUNTARY PAYMENT.
WAY, 1.

CHANCERY.

1. A and B were partners. A died. B, who settled the affairs of the partnership, took a part of the stock to himself, and gave notes to the executors of the other partner, and made several payments to them, and paid all the notes but one, on which the surviving executor brought a suit against B. B then brought a bill in equity against the executor, praying for an account of the partnership business, stating various particulars in the accounts with A, by which he, B, was injured, and that if the accounts were fairly settled, nothing would be due to the executor on the note, but a balance would be due to B from the executor, and praying an injunction against the suit at law. The defendant demurred to so much of the bill as did not relate to the partnership dealings and the defendant's capacity as executor, and as to the residue of the bill, pleaded the statute of limitation of four years. The Court sustained the demurrer, and *held* that the payments to the executors did not show any ground for equitable interference unconnected with the partnership transactions, and that the suit in equity as to them was barred by the statute. *Burditt* v. *Grew.* 108
2. In pleading matters of substance, the same strictness is required in equity as at law. *Ibid.*
3. The answer of a defendant in equity stating facts which are not inquired of in the bill, is not evidence of such facts. *New England Bank* v. *Lewis.* 113
4. Pending a bill in equity to obtain possession of a bond admitted by the defendant to be under her control, on motion it was ordered, that she should leave it with the clerk of the court, with liberty to the plaintiff to take a copy. *Keith* v *Woombell.* 211
5. A bill in equity sets forth, that on March 7, 1811, P conveyed land to D as security for a debt; that on March 21, P conveyed other land to D as security for a sum then lent to P; that these conveyances were by absolute deeds, and that no writing or instrument of defeasance was taken at the time; that the two transactions were entirely independent of each other, but that D, taking advantage of P's necessities, connected them together; that P, in October 1811, repaid the sum lent, and requested D to reconvey the land which he held as security for that sum, but that D, instead thereof, gave a note promising to pay that sum with interest, when the lands should be sold, provided they should produce the sums expressed in the deeds, with interest, and if not, the deficit was to be considered as part payment of the note; that in 1813, by a writing signed by D and P, reciting that D had purchased the lands and that P was desirous of repurchasing them, D agreed, that upon payment of a specified sum in two years with interest, he would reconvey the lands, and that if a fair price could be obtained before the expiration of the two years, he would sell a part or the whole, and apply the proceeds to his debt and pay over to P any surplus; and that the note was thereupon given up to D; and the bill alleged that this was a trust, and prayed that D should perform the trust. *Held*, that all the previous agreements were merged in this last, and that this was not a trust

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within the *St.* 1817, *c* 87. *Peirce* v. *Dorr.* 239

6. The *St.* 1817, *c.* 87, giving equity jurisdiction in cases of trust arising "in the settlement of estates," was intended to reach those implied trusts which are charged upon executors and administrators by reason of the duties, or neglect of duties, which devolve upon them in consequence of their appointment to those offices. *Semble. Gibbens* v. *Peeler.* 254

7. A trust created by an intestate in his lifetime, by a fraudulent conveyance of property which is wanted by his administrator for the payment of debts, is not embraced within the above exposition of that statute. *Ibid.*

8 But whether in such case an implied trust does not arise for the benefit of creditors, which the administrator may enforce under that statute, *quære.* *Ibid.*

9. Where an insolvent person, just before his decease, delivered to a friend, upon a secret trust and for the purpose of defrauding creditors, a promissory note, which the trustee refused to give up or show to the administrator of the deceased, it was *held*, that the note was so secreted and withheld as that it could not be come at to be replevied, within the meaning of *St.* 1823, *c.* 140, and that, by virtue of this statute, the administrator might maintain a bill in equity for discovery and relief. *Ibid.*

10. *Held*, that it was not necessary, in order to lay a foundation for such a bill, that a writ of replevin should have been first taken out. *Ibid.*

11. *Held*, that the trustee could not plead an offer made after the suit was commenced, but before the filing of an amended bill, to produce the notes to an officer so that they might be taken on a writ of replevin. *Ibid.*

12. A and B were sureties on a bond for C; a suit was brought on the bond, and A paid it; A died, and by his will made C his residuary legatee and devisee. A's estate was sufficient to pay all debts and legacies, and to leave a surplus for C, which however would not be sufficient to pay all the debts of C, who was insolvent A's administrator sued B to recover a contribution from him as co-surety on the bond; and B brought a bill for an injunction against the suit at law *Held*, that this Court had no jurisdiction of the case under *St.* 1817 *c.* 87. *Stone* v. *Hobart.* 464

See ASSIGNMENT, 2.
HUSBAND AND WIFE, 3.
PRINCIPAL AND SURETY, 2, 3
SETTLEMENT, 2.

COMMON CARRIER.

1. A person delivering a package to a common carrier to be transported, is under no obligation to state the value of the articles it contains, unless an inquiry is made on the subject. *Phillips* v *Earle.* 182

2. But it *seems*, that in case an inquiry should be made and a false answer given, or any fraudulent attempt be made to conceal the real value of the articles from the carrier, he would not be liable for the value, in case of loss without his default. *Ibid.*

3. Where a package was delivered to the agent of a stagecoach company, at the post-office, where the coach was standing, and not at the office of the company, to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way-bill, he having previously directed the person who had the care of the package to bring it to the post-office; and the package was lost before reaching Hartford; it was *held*, that the owners of the coach were liable to the owner of the package for its value, the delivery at the post-office being with the assent of their agent. *Ibid*

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4. The package was directed to a person at Hartford, who was not there at the time when the coach arrived, nor for several days after; it was *held*, that as the package never in fact arrived, the absence of the person to whom it was directed, did not exonerate the owners of the coach from their liability. *Ibid.*

COMMON PLEAS, COURT OF

See JURISDICTION.

CONDITION.

The demandant being owner of a parcel of land with a dwellinghouse thereon, adjoining on the north to land with a dwellinghouse thereon belonging to his sister, facing to the south, conveys to the tenant's grantor, in fee simple, "provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof." After the sister has conveyed her land to a stranger, the tenant mortgages by a deed reciting the foregoing provision, and afterward, while remaining in possession, makes windows in the north wall. *Held*, that the above clause was a condition, not a covenant; that it was a valid condition; and that such breach of it worked a forfeiture of the estate, and gave the demandant a right to re-enter. *Gray* v. *Blanchard*. 284

See CONTRACT, 14.

CONFUSION OF GOODS.

See ATTACHMENT, 6, 7, 8.

CONSIDERATION.

See CONTRACT, 11.
CONVEYANCE, 3.
VARIANCE, 4.

CONSIGNMENT.

See ATTACHMENT, 1.
STOPPAGE IN TRANSITU, 1, 2, 3.

CONTRACT.

1. An indenture whereby a party agrees to furnish money for the purpose of "carrying on the general business of brokerage, embracing, as time and opportunity shall give, the *vending of lottery tickets*," is illegal on the face of it. *Williams* v. *Woodman*. 78
2. Assumpsit on the following memorandum, viz. "It is agreed that B is to have the refusal of a certain farm situated, &c. which was bought by me for the sum of 1940 dollars upon his complying with certain conditions from the first day of April next, which conditions the aforesaid B has complied with." *Held*, that this was a valid contract, and that it expressed the price for which the land was to be conveyed *Bird* v. *Richardson*. 252
3. Where an agreement, signed by three persons, was afterward altered by the consent of two of them, by adding seals to the names of the signers, and interlining the words "*jointly and severally*," and was afterward delivered by those two, it was *held*, that the alteration did not vitiate the instrument with regard to those two, but that they were bound by the instrument in its altered form. *Warring* v. *Williams*. 322
4. A and B having been partners, A gave an obligation to B to indemnify B against a note on which C was promisor, C having become so merely as surety for A and B; C afterwards advanced money to B, with which B paid the note. *Held* that A was liable to B on the obligation, for the amount of the note paid by B. *Ibid.*
5. If A signs his name on a paper in blank, and by parol authorizes B to write an agreement of a certain de-

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scription over his name, he will be bound by such agreement when written over his name by B. But if B adds a seal to the name of A, and delivers the instrument as A's deed, A will not be bound. *Warring* v. *Williams*. 326

8. Where a promissory note, payable in machine cards at cash price, was made to a person who was afterwards put under guardianship, and the guardian assigned to the plaintiff "the balance which may be due on the note after deducting what may be due to one H, not exceeding 500 dollars," the note being then in the hands of one F, pledged for the payment of H's debt, and the guardian guarantied to the plaintiff "the payment of the note according to its tenor, after deducting the claim of H, which shall not exceed 500 dollars," it was *held*, in an action upon the guaranty, that if H had lost his lien, still the plaintiff's claim under the guaranty was not thereby augmented, for only the balance after the amount due to H, was assigned and guarantied to the plaintiff. *Carew* v. *Denny*. 363

1 *Held*, also, that the assignment and guaranty did not include a sum which had been previously paid and indorsed upon the note, there having been no fraudulent concealment on the part of the guardian, of such indorsement. *Ibid.*

8 *Held*, also, that H's demand, not exceeding 500 dollars, was to be paid in money, so that although cards of more than 500 dollars' worth at the appraised cash price were sold to produce that sum, only the balance of cards remaining due on the note was assigned and guarantied. *Ibid.*

9. Such balance having been accepted by the plaintiff, of the maker of the note, it was *held*, that if there was any fraud as to the quality, the guardian was not responsible for it, it being the duty of the plaintiff to examine the cards. *Ibid.*

10. Where the plaintiffs agreed to perform work for the defendant upon a canal, and the defendant agreed to make payments "from time to time by certificates from the engineer as the work advances," it was *held*, that the plaintiffs might bring an action without having given notice to the defendant of a certificate previously made, each party being bound to take notice. *Punderson* v. *Shepherd*. 379

11. The defendant gives the plaintiffs a written contract, by which, after reciting that he places his son with the plaintiffs to learn the art of printing, "to stay till he is twenty-one years of age," the defendant agrees, "in consideration of the son's being so old," (he was then eighteen,) to pay the plaintiff a stipulated amount if the son does not continue in the plaintiffs' employment six months after he is twenty-one. The son enters into the plaintiffs' employment in pursuance of the agreement, and is instructed by the plaintiffs in the art of printing, for some months, when he leaves the plaintiffs without cause. *Held*, that there was a sufficient consideration for the defendant's contract and that he was liable on it to the plaintiffs. *Phelps* v. *Townsend*. 392

12. The want of a counterpart to such a contract does not render it invalid. *Ibid*

13. A covenant by an heir expectant, that he will convey the estate which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor. *Fitch* v. *Fitch*. 480

14. A, owing B a note, gave several new notes to B, altogether being of smaller amount than the old note, and payable at future days. At the

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same time they entered into a written agreement, that if the new notes were paid "when due," the old note should be given up to A to be cancelled, but if any of the new notes were not paid, the old note should be in force; and B in such case agreed, that if he should see fit to enforce the old note, he would enter upon it such sums as A should have paid on the new note, and return the other new notes to A. A paid the first of the new notes, but the second not being paid on the day when it became due, B had a writ made out on the old note against A, and afterward indorsed on the old note the amount which A had paid, and returned the new notes, and then delivered the writ to the officer, who served it: —

Held, first, That payment of the new notes, on the days when they became due, was necessary to entitle A to the benefit of the agreement:

Secondly, That A having failed to perform this part of the agreement, B had a right to sue on the old note:

Thirdly, That the indorsing of the first payment on the old note, and the returning of the new notes, was not a condition precedent, in order to entitle B to sue on the old note:

But, *fourthly, it seems*, that if the performance of these acts had constituted a condition precedent, they were done seasonably. *Tufts* v. *Kidder*. 537

See CHANCERY, 5
DEBT, 1, 2
PRINCIPAL AND AGENT, 5.
SHIP, 3.

CONVEYANCE.

1 A grantee, not having been in actual possession of the granted premises otherwise than by leasing them to his grantor and receiving rent from him, executes to a purchaser for a valuable consideration, a deed of conveyance, by "quitclaim and release" in the form in common use in Massachusetts, which was duly recorded in the registry of deeds. *Held*, that this was a sufficient conveyance to pass the estate, though the releasee had not a previous interest in or possession of the estate. *Russell* v. *Coffin*. 143

2. Where a grant was made of a right to erect and maintain a dam from the grantee's land on one side of a stream, to the grantor's land on the other, at about the distance of sixty rods below certain mills of the grantor, and a dam was built more than sixty rods below, and afterwards, without any objection on the part of the grantor, was removed twenty rods higher up the stream, but was still below the sixty rods, such removal was presumed to be within the intent of the parties to the conveyance. *Boynton* v. *Rees*. 329

3. *Held*, also, that the grant was not invalid because no consideration was mentioned in the deed; and that to avoid it as a voluntary conveyance fraudulent as against subsequent purchasers, the party objecting to it must prove that no consideration was given. *Ibid.*

4. The erection of the dam and the occupation of it six months in the year by the grantee, it being occupied the other six by a third person, were held not to be conclusive evidence of notice of the grant, as against a subsequent purchaser of the grantor's land. *Ibid.*

See DOWER, 2.
NOTICE, 1.

CORPORATION.

1. A corporation may be bound by an implied promise. *Smith* v. *First Congregational Meetinghouse in Lowell*. 178

2. An act, incorporating individuals for a particular purpose, does not vest in the corporation, land previously owned by them as tenants in common and previously used for the same purpose. *Leffingwell* v. *Elliott*. 455

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3. Parol evidence is not admissible to show that a deed given by one of such tenants in common, of his share in the stock of the corporation, was intended to pass his share of the land. *Ibid.*

COSTS.

1. An original writ was indorsed by the plaintiff's attorney thus, "A. B. by his attorney, C. D." *Held*, that C. D. was liable as indorser of the writ, for costs. *Chapman* v. *Phillips*. 25
2. In order to entitle a trustee, under *St.* 1794, *c.* 65, § 4, to costs, it is not necessary that the answer made by him at the first term should be sworn to in court. *Ibid.*
3. Where a person summoned as trustee is discharged and recovers judgment for costs against the plaintiff, the indorser of the writ is not liable for such costs, his liability only extending to costs recovered by the defendant. *Ibid.*

See AMENDMENT, 8.
SET-OFF, 2.
TRUSTEE PROCESS, 7, 8.

COVENANT.

1. The defendant, in 1799, conveyed to the plaintiff land in New York, with covenants of warranty and freedom from incumbrances. A judgment had been recovered in 1786 against the defendant's grantor, which constituted a lien on the land, and in 1801, upon a *scire facias* to revive the judgment, an execution was issued, by virtue of which the land was sold by the sheriff and a deed given by him to the purchaser. *Held*, that as the plaintiff's title was entirely defeated, there was a breach of the covenant against incumbrances, and that the damages were the amount of the consideration and interest. *Jenkins* v. *Hopkins*. 346
2. The testimony of witnesses, that they were in possession of the land claiming title under a grantee of such purchaser, without proof of a conveyance by deed from such grantee, was held not to be sufficient evidence of an actual eviction under a paramount title, to authorize the plaintiff to recover on the covenant of warranty. *Ibid.*
3. If a grantee of land with warranty, being evicted by a paramount title, extinguishes such title for a nominal consideration, he can recover upon the warranty the amount of such consideration only, together with a reasonable compensation for any trouble and expenses to which he may have been put in procuring the extinguishment. *Leffingwell* v. *Elliott*. 455
4. Land granted by A to T with covenants against all incumbrances and of general warranty, was nevertheless subject to a mortgage to C, on which C subsequently recovered the conditional judgment, and obtained possession of the land. While the land continued in T's possession, he mortgaged it for a smaller amount than C's mortgage After C had thus obtained possession, T brought an action against A for a breach of the above covenants, in which it was *held*:— 1. That the covenant against incumbrances was broken when the deed was executed, but that T could only recover nominal damages, as he had not paid any thing to remove the incumbrance: 2. That the covenant of warranty was broken; that T, by his mortgage, had assigned this covenant, to the extent of the sum due on this mortgage, to the mortgagee; that the damages recoverable in this action, were the amount of C's judgment and costs, deducting the amount of the mortgage which T had made himself; and that if before judgment T paid off the mortgage made by himself, he could recover in

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this action the whole amount due to C. *Tufts* v. *Adams*. 547
See BILL OF EXCHANGE, &c. 16.
CONDITION.

DAMAGES.

1. When a foreign creditor sues for his debt in this State, he will recover (except in the case of a bill of exchange) at the par of exchange. *Adams* v. *Cordis*. 260
2. So if the debtor here is summoned upon the trustee process, he will be charged at the par of exchange. *Ibid.*
3. Where one summoned as trustee is indebted to the principal defendant on a demand drawing interest, and he continues, after the service of the writ upon him, to use the money due, he is chargable with interest up to the time when the money is demanded of him upon the execution against the fund in his hands; but where interest would be recoverable by the principal defendant, only as damages for breach of contract, it will not accrue during the pendency of the trustee process. *Ibid.*

See CONTRACT, 3.
COVENANT, 1, 3, 4.
INSURANCE COMPANY, 6.
TRESPASS, 6.
WAY, 7.

DEBT.

1. Counts on a special contract under seal, and a *quantum meruit* for labor done and materials found, may be joined in an action of debt. *Smith* v. *First Congregational Meetinghouse in Lowell*. 178
2. An action of debt or assumpsit may be maintained upon an implied promise, for labor done and materials found under a special contract which has not been performed on the part of the plaintiff. *Ibid.*

See WASTE, 3, 4, 5, 6.

DEED.

See CONTRACT, 5.
EVIDENCE, 3.

DEPOSITION.

See PRACTICE, 3.

DEVISE.

1. A testator gave a specific and several general legacies, and devised his farm, being all his real estate, to several of his children, and afterwards by a general clause made the same children residuary legatees and devisees; his personal property was not sufficient to pay his debts and the specific legacy. *Held*, that the general legatees must lose their legacies, and that the real estate, being specifically devised, could not be sold to pay them. *Humes* v. *Wood*. 478
2. "I give and bequeath to my two sons, Israel and Timothy, a farm, and such rights and lots of common as are laid out adjoining the farm, and the buildings thereon, the same to be equally divided between them both in quantity and quality, in manner following; — I bequeath to Israel the southwardly end of said farm, except five acres, together with all that part of the meadow that lieth on the northeast side of the ditch that is cut through my meadow; — I bequeath to Timothy the northwardly end of said farm, except the piece of meadow bequeathed to Israel, together with five acres before excepted, — upon condition, that my two sons shall, in equal proportions, pay and discharge the several legacies bequeathed to my daughters:" — *Held*, that the sons took estates in common. *Walker* v. *Dewing*. 520

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

1. To a writ of dower, the tenant, who is a purchaser, pleads that he cannot deny the right of the de-

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mandant to be endowed, but that he has made improvements on the land, and that he has always been ready to render to the demandant her reasonable dower, according to her just rights in respect to the increased value of the land, and that on a day specified he assigned a third part of the land, in the condition in which it was at the time of the alienation, by metes and bounds ; and he prays that the increased value may be inquired of. Upon demurrer it was *held*, that as a plea in bar, the plea was bad ; and that it must be construed as admitting a right to recover dower according to the value at the time of the alienation, but denying the right to be endowed of the improvements. *Stearns* v. *Swift*. 532

2 If a wife joins in a deed with her husband, "in token of her relinquishment of dower," without any words of grant on her part, although the husband may have previously parted with all his right and title to the grantee named in the deed, she is nevertheless estopped to claim her dower. *Ibid.*

See EXECUTOR, &c. 1.
MORTGAGE, 7, 8.

ESTOPPEL.

The obligors in an administration bond are estopped by it to deny that the principal was appointed administrator. *Cutler* v. *Dickinson*. 386

See EXECUTOR, &c. 7.
MESNE PROFITS, 4.
POOR, 2.
RELEASE, 4.

EVIDENCE.

1. Where in an action of covenant upon an indenture, whereby the defendant agreed to furnish money for the purpose of carrying on the general business of brokerage, embracing, as time and opportunity should give, the vending of lottery tickets, the defendant, after oyer, pleaded that the object and intent of the indenture was the buying and selling of lottery tickets, against the form of the statute, and issue was taken thereon, it was *held*, that evidence to prove that the plaintiff did, subsequently to the contract, buy and sell lottery tickets, was pertinent to the issue and properly admitted. *Williams* v. *Woodman*. 78

2. *Held*, that after a verdict for the defendant on such issue, the plaintiff could not object that the plea attempted to put in issue before a jury the construction of a sealed contract, but that such objection should have been taken by demurrer. *Ibid.*

3. One of two witnesses to a deed deposed that he did not recollect witnessing it, but knew the attestation to be in his handwriting, and that the other subscribing witness had a short time previously, but long after the commencement of the suit in which the deposition was taken, left the Commonwealth, after advertising his intention so to do, and that though the deponent did not recollect having seen him write his name, he had often received letters from him, and thought the signature in question was his handwriting. *Held*, that this was sufficient proof of the execution of the deed for the purpose of reading it in evidence. *Russell* v. *Coffin*. 143

4. Where a witness on the stand, upon cross-examination, contradicted a deposition he had previously given in the same case, the party calling him was not permitted to call other witnesses in support of his general character for truth. *Ibid.*

5 The general rule, that a party cannot give evidence of his declarations in his own favor, applies to declarations made by the plaintiff in an action which is defended,

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pursuant to the statute, by creditors of the defendant. *Carter* v. *Gregory*. 165

6. A note was made by a failing debtor, on which the payee immediately made an attachment of the debtor's property. Part of the alleged consideration of the note was an acceptance made by the payee, of an order drawn on him by the debtor in favor of another creditor. A subsequent attaching creditor being admitted, under the statute, to defend, it was *held*, that the plaintiff could not introduce evidence of his own declarations made on the day when the note was given, to show that the acceptance was made before the attachment. *Ibid.*

7. Where in assumpsit on a policy of insurance on a ship, the declaration alleged that the ship, by force and arms, and in a hostile manner, was captured, seized and taken by certain armed soldiers and thereby wholly lost, and the plaintiff proved by witnesses, that she was seen in the possession of armed soldiers in a foreign country, and that she never returned home, it was *held*, that he had made out, *primâ facie*, a loss, and that he was not bound to read in evidence the record of a trial and decree of condemnation, which he had in court and which he offered to the defendant to be used by him if he thought proper. *Dorr* v. *Pope*. 232

8. In an action by the assignee of a mortgage to recover possession of the mortgaged premises, against a disseisor, the affidavit of his assignor is not admissible in evidence to prove the loss of the mortgage deed, for the assignor might be a witness in the case. *Poignand* v. *Smith*. 272

9. In such an action, if diligent search and inquiry are made for the mortgage deed, by the demandant, and it cannot be found, he may give a copy from the registry in evidence. *Ibid.*

10. If the mortgage deed appears from the registry copy to be an indenture interchangeably signed and sealed, and the part belonging to the mortgagee is proved to be lost, in order to make the copy admissible, due diligence must be shown to ascertain whether any counterpart exists, and if it does, to obtain it to be used in the trial. *Ibid.*

11. Evidence of acts done and declarations made by the claimants of land, after a possession by one of them for thirty years, is admissible to show that such possession was not adverse. *Church* v. *Burghardt*. 327

12. Where a witness, who had assisted in erecting and maintaining a mill-dam, and had used it long enough to create the presumption of a grant of an easement in the stream, stated that his right was derived from a written agreement, it was *held*, that his testimony of the terms of the agreement was inadmissible, without evidence of the loss of the instrument, to prove the title to the easement. *Boynton* v. *Rees*. 329

13. The testimony of a juror who tried the cause, is admissible upon the hearing of a petition for a review. *Ferrill* v. *Simpson*. 359

14. The affidavit of a party to a suit may be received to prove the loss of a writing, in order to let in secondary evidence of its contents. *Donelson* v. *Taylor*. 390

15. Whether the loss of a paper is sufficiently proved to let in secondary evidence of its contents, is a question for the court. *Ibid.*

16. If the testimony of a witness is inadmissible to prove such loss, by reason of his being interested in the suit, and his being interested is known to the party against whom he is called to testify, he must be objected to before he is sworn and examined, or the objection will be too late. *Ibid*

17. The return of an officer that he

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has attached certain property, is not of itself sufficient evidence of an attachment in fact, in a suit against him by another officer claiming to have attached the same property. *Merrill* v. *Sawyer*. 397

18. Where a deputy sheriff returned on a writ, that on the day specified he attached hay in the defendant's barn, his declaration on the same day, while he was at work on a fence near the barn, that he had attached the hay and was then watching it, was *held* inadmissible to prove the attachment, it not being a part of the *res gestæ*. *Ibid.*

19. In an action brought by the town of W against the town of O, for expenses incurred in the support of a pauper, on the question whether the pauper derived a settlement in O from his grandfather through his father, it was *held*, that copies of a deed, executed by the grandfather in 1754, in which he was described as being of O, and of his last will, made in 1758, in which he was described as "now resident in O," were admissible evidence to prove that the grandfather gained a settlement in O, under *Prov. St.* 12 & 13 *Will.* 3, *c.* 10. *Ward* v. *Oxford*. 476

20. *Held*, also, that evidence proving that the grandfather, for a long time before 1754, had a settlement in the town of S, and that afterward, for years previous to 1784, the father of the pauper was supported as a pauper by S, was admissible to rebut the presumption arising from the description of the grandfather in the deed and will. *Ibid.*

21. Where on a trial a witness is examined respecting a matter which is irrelevant to the issue, by both parties without objection, one of the parties cannot afterward object to the witness's further examination with regard to the same subject. *Young* v. *Mason* 551

22. In order to establish, on a trial, a title to personal property by purchase, it is not necessary for the purchaser to offer his bill of parcels in evidence; but he may prove his purchase by parol evidence. *Blood* v. *Harrington*. 552

23. If the other party wishes to have the bill of parcels produced on the trial, he should give notice beforehand to the party who has it in his possession. *Ibid.*

24. The constitutional provision that a subject shall not be compelled to furnish evidence against himself, has reference to criminal cases only. *Keith* v. *Woombell*. 211

See BASTARD, 1, 2.
BILL OF EXCHANGE, &c. 13
CHANCERY, 3.
CONVEYANCE, 4.
CORPORATION, 3.
COVENANT, 2.
LIMITATIONS, STATUTE OF, 6
MILITIA, 2.
NEW TRIAL, 1.
PRACTICE, 1, 3.
PRESCRIPTION, 4.
PRINCIPAL AND AGENT, 8.
PRINCIPAL AND SURETY, 5.
SHIP, 2.
VARIANCE, 3, 5.

EXCEPTIONS.

If exceptions are unseasonably filed to an interlocutory order of the Common Pleas in an action in which the party excepting wishes to have a trial, he should enter his exceptions in this Court, where they will be dismissed, and then the action may be brought forward on the docket of the Common Pleas. *Ely* v. *Ball*. 352

See TRUSTEE PROCESS, 14.

EXECUTION.

See INSOLVENT LAW, 2.

EXECUTOR AND ADMINISTRATOR.

1. The widow of an intestate had her

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dower assigned to her in all his real estate. Afterward a judgment was obtained against his administrator on a demand for which the intestate was liable as a surety, and the real estate not assigned as dower was sold by the administrator under a license of court, and the proceeds applied in satisfaction of the judgment. The administrator then brought a suit and recovered judgment against the principal debtor, and levied on his land. It was *held*, that the administrator did not stand seised and possessed of this land for the benefit of the widow and heirs, but of the heirs alone, their portion only of the intestate's real estate having been taken to discharge the judgment against the administrator; and that the case did not come within the spirit and intention of *St.* 1788, *c.* 51, § 3, which provides, that whenever an administrator shall recover a judgment and levy on land, he shall stand seised and possessed of such land to the use of the widow and heirs of the intestate. *Hancock* v. *Minot.* 29

2. The statute of 1791, *c.* 28, limiting suits against executors and administrators to four years, may be pleaded in bar to a suit in equity as well as a suit at law. *Burdill* v. *Grew.* 108

3. In pleading the statute of limitations respecting suits against executors and administrators, it is sufficient for the defendant to allege that he posted up notifications of his appointment "in public places in the city of B," without specifying the places. *Ibid.*

4. It is not necessary to set forth in such a plea to a bill in equity, that such city was the place of the testator's residence at the time of his death, where that fact appears in the bill itself. *Ibid.*

5. It is sufficient in such a plea to aver, that the executors gave "bonds according to law," without saying that they were given to the judge of probate. *Ibid.*

6. An administrator's first account of his administration may be allowed by the Court of Probate, although not rendered until after the expiration of four years from the time of giving notice of his appointment. *Dickinson* v. *Arms.* 394

7. The same person being administrator on the several estates of A and D, and the estate of D, which was solvent, being indebted to the estate of A upon a promissory note, the administrator, in his administration account of the estate of D, charged the amount of the note as paid by himself at a date more than four years after he had given notice of his appointment as administrator on that estate, with interest to that date. *Held*, that the date was not conclusive against him as to the time of payment, but that the law would presume he paid the note as soon as he had sufficient funds in his hands. *Ibid.*

8. *Held*, also, that he had no right to charge interest on the note after his liability to pay ceased. *Ibid.*

9. Where an original administration is granted in another of the United States, and an ancillary administration, in this State, and the estate is insolvent, a creditor in this State is entitled to a *pro ratâ* dividend only, although the assets in this State are sufficient to pay his demand in full. *Davis* v. *Estey.* 475

10. Where an original administration was granted in another State, and a commission of insolvency was issued, of which no notice was given to a creditor in this State until after the commission was closed, and ancillary administration was granted here, but no commission of insolvency was issued, and the creditor brought an action against the ancillary administrator, it was ordered that he should recover a judgment for his whole debt, upon which he would be entitled to a *pro ratâ* div-

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idend, but that no execution should issue. *Ibid.*

11. If an administrator, in his answer to interrogatories proposed to him in the Court of Probate touching his account, makes an admission tending to charge himself with any estate omitted in his account, and at the same time states a fact in his discharge, such statement must be rejected as irrelevant, unless supported by proof. *Higbee* v. *Bacon.* 484

12. The party at whose instance interrogatories have been proposed, in the Court of Probate, to an administrator touching his account, has a right to offer evidence to disprove his answers. *Ibid.*

13. An administrator is not required to give a new bond to the judge of probate, upon being licensed to sell so much only of the real estate of the intestate as shall be sufficient for the payment of debts, with incidental charges. *Fay* v. *Valentine.* 526

14. If such a bond is legal, still it is not a probate bond, and therefore an action upon it cannot be commenced originally in the Supreme Court *Ibid.*

See BOND.
CHANCERY, 6, 7, 8, 9.
ESTOPPEL.
FRAUDULENT CONVEYANCE.
MORTGAGE, 5, 6.

FACTOR.

See PRINCIPAL AND AGENT, 9, 10, 11.

FRAUD.

See ACTION, 2.

FRAUDS, STATUTE OF.

See PRINCIPAL AND AGENT, 1, 2.

FRAUDULENT CONVEYANCE.

An absolute deed of land made by the principal in an administration bond to a surety, the grantor taking back a writing, not under seal, for a reconveyance upon the grantee's being saved harmless upon the bond, is not *per se* fraudulent as against creditors of the grantor. *Culler* v *Dickinson.* 381

See CHANCERY, 7, 8, 9.
CONVEYANCE, 3.
HUSBAND AND WIFE, 1, 2

GUARANTY.

1. The act incorporating an insurance company required all policies to be signed by the president. A policy of insurance, which provided that a loss should be payable to the assured or his assigns, was assigned, and the company's assent to the assign ment signed by the secretary only, and the assignee guarantied the premium note, the company having refused to assent to the assignment without this guaranty. In an action against the guarantee of the note, *held*, 1. That the assent of the office to the assignment was a sufficient consideration for the guaranty, as without it, an assignee, in case of loss, could sue only in the name of the assignor: 2. That the act of incorporation did not require the assent to the assignment to be signed by the president: 3. That the secretary's signature *primâ facie* bound the company, and that having accepted the guaranty, it had adopted the act of the secretary. *New England Mar. Ins. Co.* v. *De Wolf.* 56

2. Where upon the back of a promissory note made by S and A to the plaintiffs, were written the words, "I guaranty the payment of the within note," which were signed by the defendant, it was *held*, that he was a guarantee and not a surety. *Oxford Bank* v. *Haynes.* 423

3. The guarantee of a promissory note will be discharged by a neglect of the holder to demand payment of the maker and to give the guarantee notice of non-payment, provided the

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maker was solvent when the note fell due but has since become insolvent. *Ibid.*

See CONTRACT, 6, 7, 8.
PRINCIPAL AND AGENT, 7, 8.

GUARDIAN.

1 F mortgaged land to C, with condition for the payment of a sum of money due to a minor, of whom C was guardian. C not wishing to retain the guardianship, the judge of probate made a decree appointing R guardian, "he giving bond as the law directs;" and a letter of guardianship was made out in the probate office, indorsed, "to be delivered to R when bond is filed." R never filed a bond nor received the letter of guardianship, but he assumed to act as guardian; and no decree was passed discharging C from the trust. R, after his appointment as above stated, sold the mortgaged premises as the agent of F. C claimed the money of the purchaser, on account of the minor, and part of it was paid to him; the residue was afterward paid to R in the presence of C, and R gave the purchaser a deed from F, and C discharged the mortgage. The money was immediately paid over by R to C. C testified that he received it in discharge of a debt due from R, and not for the use of the minor. Another witness testified, that being called upon by C to pay a note given by F to C, he told C he thought the land was sold for enough to pay the mortgage and this note; C replied, that the mortgage had been paid to him, but that he had received nothing towards the note. *Held*, that R was the agent of C, as well as of F; and that C should be considered as having received the money for the minor, as otherwise fraud must be presumed; and that F was discharged from his liability to the minor. *Fay* v. *Hurd*. 528

2. *It seems* that the proceedings in the Probate Court, and the doings of R, did not constitute him the guardian of the minor; and that C continued in that office. *Ibid.*

See SPENDTHRIFT, 1, 2.
TAX, 5.

HUSBAND AND WIFE.

1. An ante-nuptial contract by which the wife is to hold her own earnings to her separate use, is fraudulent as it respects previous or subsequent creditors of the husband. *Keith* v. *Woombell*. 211

2 Whether a settlement upon a wife after marriage, without any previous contract or consideration, by a person free from debt, is valid against creditors, *quære;* but at any rate the intention to make such a settlement must be clearly proved. *Ibid.*

3. Husband and wife give their joint promissory notes and take from the promisee a bond, that if they, or either of them, pay all taxes on certain land, he will, upon payment of the notes, convey the land, at the request of the wife, to her or her appointee. The husband is an ignorant man, and incapable, by reason of alienage, of holding real estate. *Held*, that an intention to make a settlement on the wife was not clearly proved; and she was decreed to deliver the bond over to the husband's assignee. *Ibid.*

See DOWER, 1, 2.
EXECUTOR, &c 1.
MARRIAGE AND DIVORCE, 1, 2.
SETTLEMENT, 2.

INDICTMENT.

1. An indictment under the second section of *St.* 1814, *c.* 175, for receiving and concealing a dead body, was sustained, where the evidence, though it had a tendency to prove an offence under the first section, of digging up the body, did not

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conclusively prove such offence. *Commonwealth* v. *Loring*. 370

2. An indictment against the town of N. B. for not repairing a highway, alleged that there was a highway leading from a meetinghouse in the town of B. to the dividing line between B. and N. B and thence in N. B. to the meetinghouse in N. B. and that the defendants allowed "a certain part thereof, consisting of twenty rods in length," to be out of repair. *Held*, that the indictment was defective, inasmuch as it was left uncertain in which of the towns the unrepaired part of the highway lay. *Commonwealth* v. *North Brookfield*. 463

See LORD'S DAY, 1, 2.

INFANT.

See ABATEMENT.
AMENDMENT, 7, 8.

INJUNCTION.

See CHANCERY, 12.

INSOLVENT LAW.

1 A certificate obtained under an insolvent law of one State, which declares the person of the insolvent to be exempted from arrest for debts contracted previously to his assignment, is no bar to an action on such a debt, commenced by arresting him, in another State. *Boston Type &c. Foundery* v. *Wallack*. 186

2 W, a resident in New York, made at that place a negotiable note, in payment for goods, to an agent of a corporation established in Massachusetts, the agent also residing in New York, and W knowing the contract to be made on behalf of the corporation. W afterward assigned his property and obtained a certificate under the insolvent laws of New York, which declared his person to be exempted from arrest for debts contracted previously to his assignment. *Held*, that this certificate was no bar to an action brought by the corporation against W, in Massachusetts, which was commenced by arresting him; and that the certificate could not affect the judgment or form of the execution in Massachusetts. *Ibid.*

3. Whether W has any remedy for being arrested on mesne process or on execution in Massachusetts, *quære*. *Ibid.*

4. A discharge obtained under an insolvent law of one of the United States is no bar to an action brought by a citizen of another State against the insolvent, even upon a contract made between them in the State where the insolvent law was passed. *Braynard* v. *Marshall*. 194

5. Therefore where P, who was residing in New York with the intention of becoming a citizen of that State, sold goods there as the agent of B, a citizen of Massachusetts, to M, a citizen of New York, taking for them M's note payable to P or order in three months, which P immediately passed to B; and afterwards M obtained a discharge under the insolvent law of New York; in an action by B, as indorsee, against M, as maker of the note, it was *held*, that the discharge obtained in New York was no bar to the action. *Ibid.*

INSURANCE.

1. Insurance was made on a ship "at and from Boston to all ports and places on the globe, and until her return to Boston, not exceeding two years." She sailed from the coast of Brazil for Boston, and on arriving in Boston bay, below the harbour, was ordered by the owner to put into Salem, the two years not having yet expired. She accordingly put into that port, for the purpose of being repaired. *Held*, that the risk did not terminate on her arrival at Salem. *Ellery* v. *New England Ins. Co.* 14

2. The destination of the vessel to

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Boston did not, in such case, limit the risk insured, thereafter, to that voyage, but the owner might, at any time before her arrival at Boston, alter her destination, and the risk would still continue. *Ibid.*

5. Putting into Salem in such case was not a deviation. *Ibid.*

4 Under such a policy, visiting the same port more than once is not a deviation. *Ibid.*

5. A damage done to a ship by the violence of the wind during an attempt to haul her upon a marine railway to be repaired, and while she is partly on land, is covered by a policy of insurance against loss by the perils of the seas and "all other losses to which assurers are liable," this being a loss *ejusdem generis* with those specified. *Ibid.*

6. Where a new and a safe mode of repairing ships has come into use since the making of insurance on a ship, the assured may avail himself of it without prejudice to the policy. *Ibid.*

7. Thus, a ship was insured for two years, by a policy made at Boston, where there was no marine railway, and before the expiration of the time she put into a neighbouring port to be repaired upon such a railway, this mode of repairing having there got into pretty general use since the making of the policy, and while she was hauling upon the railway she was blown over and bilged; and it was *held*, that this was a loss within the general words of the policy, "all other losses and misfortunes to which assurers are liable by the rules and customs of insurance in Boston." *Ibid.*

8. A party interested in a ship, but whose name does not appear in the customhouse documents or bill of sale, is not obliged, for this reason merely, to disclose the nature of his interest at the time of getting insurance, unless he is questioned in this respect by the underwriters. *Bixby* v. *Franklin Ins. Co.* 86

9. Where a master of a vessel, insured from one port to another, intends to deviate by putting into an intermediate port and actually puts in there, the assured may nevertheless give evidence that necessity, and not the original intention, was the immediate cause of putting in, and that consequently there was no deviation. *Hobart* v. *Norton.* 159

10. A vessel being advertised for a voyage from Boston to Charleston, took goods for the latter port, which, by the bill of lading, were to be delivered there, and which the shipper caused to be insured for such a voyage. She took other goods for Edgartown in the island of Martha's Vineyard, it being the original intention to put into that port. The vessel did in fact put into Edgartown, but the course of the wind and tides was such that she must have so put in, had there been no such intention originally. The goods were afterwards damaged by perils of the seas in the course of her voyage to Charleston, and sold at a loss. *Held*, that the owners of the vessel were not answerable to the shippers for this loss. *Ibid.*

11. The intention, at the commencement of a voyage, to put into an intermediate port out of the course of the voyage described in the bills of lading and advertisements, the termini being still the same, is not the substitution of a different voyage, but is only an intention to deviate. *Ibid.*

See EVIDENCE, 7.
GUARANTY, 1.

INSURANCE COMPANY.

1. The by-laws of an insurance company provided that the certificates of stock should be transferable only at the office of the company, by the holder personally or by his attorney, and that transfers should be authenticated by the president, and attested by the secretary, and that it

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should be the duty of the president to attend at the office during business hours. An assignment of some shares was made to two copartners, with a power to them *both*, to transfer the same on the books of the company, and *one* of the partners called at the office during business hours, and, the president being absent, exhibited to the secretary the assignment and power of attorney, and demanded that the shares should be transferred on the books of the company and certificates issued to himself and his copartner, but the secretary declined doing any thing in the matter, saying it was the president's business. The assignors were indebted to the company in one sum that was then due, and in others not then due. *Held*, that the company had no lien upon the shares as security for their demands against the assignors, and that they were bound to make a transfer of the shares on their books as demanded, and to issue new certificates to the assignees. *Sargent* v. *Franklin Ins. Co.* 90

2. The purchaser of shares of the stock of an insurance company is entitled to a certificate, on producing evidence of the assignment, to the officers of the company at their office. *Ibid.*

3. The shares of the capital stock of an insurance company are personal property of an assignable character, and any by-law of such company which should require the transfers to be made only at its office personally or by attorney with the consent of the president, would be a restraint contrary to the general law of the Commonwealth, which permits the right of personal property and incorporeal hereditaments to be transferred in various ways. *Ibid.*

4. An insurance company has no implied lien on the shares of the stock, as security for debts due from any of the stockholders. *Ibid.*

5. Dividends declared by an insurance company, on shares of a stockholder indebted to the company, may be retained by the company towards satisfaction of the debt. *Ibid.*

6. Where an insurance company, being bound to enter on its books a transfer of shares in pursuance of an assignment of the same, made by the former holder, refused to enter such transfer, and caused the shares to be attached and sold as the property of the former holder, it was held to be liable in damages to the assignees of the shares; and the amount of damages in such case is the value of the shares at the time of such refusal, with interest from that time. *Ibid.*

INTEREST

See DAMAGES, 3.
EXECUTOR, &c. 8.

JOINDER OF ACTIONS.

See DEBT, 1.

JUDGMENT.

See SET-OFF, 1, 2.

JURISDICTION

By *St.* 1785, *c.* 28, § 1, a person committing certain trespasses therein specified is subjected to a fine, to the use of the Commonwealth, to be recovered on complaint before a justice of the peace; and by *St.* 1800, *c.* 57, § 4, all penalties and forfeitures given or limited by any act, in whole or in part, to the use of this Commonwealth, may be recovered by indictment in any court proper to try the same. *Held*, that the Court of Common Pleas have original jurisdiction of the offences enumerated in the first section of the statute of 1785. *Commonwealth* v. *White.* 453

JURY.

One returned as a juror, who had served before within three years

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though drafted a little more than three years ago, was excused from serving. *Ex parte Brown.* 504

See EVIDENCE, 13.
LIMITATIONS, STATUTE OF, 4.
NEW TRIAL, 2.

LEASE.

The owner of land having leased a marble quarry thereon for ten years, conveyed the land "reserving the use of the quarry until the expiration of the lease." The lease was cancelled within the ten years with the consent of the parties. *Held*, that the reservation was not thereby extinguished, but that it would continue in force till the end of the ten years. *Farnum* v. *Platt.* 339

LIEN.

See ATTACHMENT, 3, 4.
INSURANCE COMPANY, 1, 4, 5.
PRINCIPAL AND AGENT, 9, 10.
SHIP, 3.

LIMITATIONS, STATUTE OF.

1. An account that is closed, is not therefore necessarily a settled account. *Bass* v. *Bass.* 187
2. An account "concerning the trade of merchandise, between merchant and merchant," is not barred by the statute of limitations, although none of the items are within six years before the action was brought. *Ibid.*
3. The death of one of the parties to such an account, does not operate as a settlement or statement of the account, so as to bar it by the lapse of six years from the time of his death. *Ibid.*
4. Whether accounts concern "the trade of merchandise between merchant and merchant," is a question of fact to be decided by the jury. *Ibid.*
5. Such accounts are not merely accounts for merchandise bought and sold between the parties, but also include demands for money growing out of the trade of merchandise. *Ibid.*
6. The lapse of twenty years from the time of a debt's becoming due, does not operate as an absolute bar to its recovery, but affords a presumption of payment; which presumption may be rebutted by evidence tending to show that payment has not in fact been made. *Ibid.*
7. The defendant in an action upon a promissory note, said "he supposed that the note was paid by the land mortgaged as collateral, that he was willing to do what was right, that he should be willing to make some small additional payment, for the purpose of settling the business, but if the plaintiff thought proper to sue, without taking the land, he should resist the suit." *Held*, that this did not take the demand out of the statute of limitations, although it was proved that the value of the land was much less than the amount due on the note. *Gardner* v. *Tudor.* 206
8. A person, who sees the promisor of a note sign it, has no right, at another time, to subscribe his name as a witness to the note, without the consent or knowledge of the promisor; and therefore his thus subsequently putting his name as a witness, will not bring the note within the exception in the statute of limitations in regard to witnessed notes. *Smith* v. *Dunham.* 246
9. A note was signed by the maker in the presence of the attorney of the payee, the attorney having previously written upon it the word "*Witness*" in the usual place, and intending to subscribe it himself as a witness. But he did not inform the maker of his intention of witnessing the note, and accidentally neglected to put his name to it as a witness while the maker was present. Two or three hours afterward the attorney subscribed his name as a witness, the maker not

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being present and not knowing or consenting to his so subscribing, and then delivered the note to the payee. *Held*, that the note was not so witnessed as to avoid the statute of limitations. *Ibid.*

10. But *it seems*, that the attorney having acted *bonâ fide*, his thus signing as a witness was not such an alteration as would render the note void. *Ibid.*

See CHANCERY, 1.
EXECUTOR, &c. 2, 3, 4, 5.

LORD'S DAY.

1. On an indictment against a victualler, for a violation of *St.* 1816, *c.* 112, § 1, by keeping his shop open on the evening of the Lord's day, it was *held*, that by the words "any part of the Lord's day or evening," the legislature intended Sunday and the evening immediately following sunset on that day. *Commonwealth* v. *Newton.* 234

2. *Held*, also, that the indictment was sustained by proof, that the shop was kept open on any Sunday evening previous to the finding of the indictment and within the time limited for such a prosecution. *Ibid.*

MALICIOUS PROSECUTION.

1. Where in an action for a malicious prosecution it appeared that the defendant had caused the plaintiff to be twice indicted, and that the attorney of the Commonwealth had entered a *nolle prosequi* on the second indictment, "it appearing that the accused has been formerly acquitted of the offence charged against him in this indictment," it was *held*, that the defendant might notwithstanding show that the second indictment was for a different offence from the one first charged, and that so there was probable cause for the second accusation. *White* v. *Ray.* 467

2. There is a material variance between an indictment "for drawing and depositing in and across a high way a quantity of stones," and one "for building a stone wall in and upon the same highway;" and in an action for a malicious prosecution brought against the prosecutor of the last mentioned indictment, it being proved that the plaintiff was guilty of the offence therein charged, and it not appearing, upon proper averments, that the two indictments were for the same offence, it was *held*, that the defendant had shown probable cause for the prosecution. *Ibid*

MANDAMUS.

See PARISH, 1.

MARRIAGE AND DIVORCE.

1. *It seems* that where a man has been divorced on account of his adultery, a marriage by him in this State, during the life of his first wife, is void. *Putnam* v. *Putnam.* 433

2. But if he, being a resident in this State, for the sake of evading the law, goes into a neighbouring State where such a marriage is valid, and is there married and immediately returns and continues to reside here, the marriage is valid here, and after his death his widow is entitled to dower in his estate. *Ibid*

MERGER.

See SETTLEMENT, 2.

MESNE PROFITS.

1. A judgment against the tenant in a writ of entry brought in the name of one of several co-heirs at their joint expense, to try the title, will not enure to the benefit of each of those co-heirs in an action of trespass for mesne profits. *Allen* v. *Carter.* 175

2. Where a mortgagee brings a writ of entry against the mortgager, without declaring upon the mortgage, and recovers a judgment a

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common law, by virtue of which he enters upon the mortgager, the mortgager is not liable in trespass for mesne profits. *Boston Bank* v. *Reed*. 459

3 So where the grantee of an equity of redemption conveyed the same to a stranger, but still continued in possession, and the mortgagee brought a writ of entry against him, not declaring on the mortgage, and recovered a judgment at common law and entered upon the tenant by virtue thereof, but showing no title except under the mortgage, it was *held*, that the tenant was not liable to the mortgagee for mesne profits. *Ibid.*

4 Where the tenant in such writ of entry, denying his liability for mesne profits, nevertheless gave his promissory note to the mortgagee for a sum equivalent to the value of the mesne profits for a portion of six years, with the understanding however, that if certain persons, to whom he was to apply, should say he was not liable, the note should be given up, but he never made such application, it was *held*, that he was not estopped to say that the note was without consideration and void *Ibid.*

MILITIA.

1 An enlistment in a volunteer company of militia is not dissolved by the soldier's removing out of the limits of the regiment to which the company is attached, into the limits of another regiment within the same brigade, and performing duty in a standing company belonging to this last mentioned regiment. *Munyan* v. *Coburn*. 431

2. Where a captain of a company of militia certified on the warrant of a sergeant, that such sergeant "has been appointed clerk of said company and has taken the oath necessary to qualify him to discharge the duties of his office," without dating the certificate, it was *held*, that the captain (then become major) might amend by affixing the date, and also that parol evidence of the time was admissible; that the oath must be presumed to have been administered by the captain; and that the certificate was sufficient, though it did not set forth the oath which was administered. *Clapp* v. *Watson*. 449

MILLS.

See CONVEYANCE, 2, 4.

MORTGAGE.

1. Where land is mortgaged, a person who by taking possession of it disseises the mortgager, disseises also the mortgagee, and so long as the disseisor is in possession, the deed of the mortgagee will not pass his, the mortgagee's, interest in the land. *Poignand* v. *Smith*. 272

2. Where a person, without title, took possession of land which was under mortgage, and built on parts of it a carpenter's shop and a blacksmith's shop, and the tenants of the carpenter's shop occasionally used parts of the lot adjacent to their shop, to spread their boards on, and the tenants of the blacksmith's shop used other parts of the lot to run carriages on, and put tires on wheels, it was *held*, that this was a disseisin of the mortgagee only for the part of the land covered by the shops. *Ibid.*

3. Taking possession of a mortgaged estate for the purpose of foreclosure, does not operate as a payment of the mortgage money; for the land still remains only a security for the money. *West* v. *Chamberlin*. 336

4. S having mortgaged an estate to W to secure the payment of several notes, W assigned the notes and mortgage to C, taking from C a written agreement with regard to one of the notes, which was for 500

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dollars, that he, C, would pay 500 dollars to W as soon as it could be collected on the note of S. C received 30 dollars of S on account of this note, and took possession of the mortgaged premises for the purpose of foreclosure, and S occupied the estate for some time afterwards as tenant to C, but S, being insolvent, never paid C any thing for rent. — In an action brought by W against C on his contract, before the three years for foreclosure had expired, the declaration also containing a count for money had and received, it was *held*, that the taking possession of the mortgaged premises did not amount to payment of the mortgage, and therefore that C was not liable on his contract; that C was not liable to pay the 30 dollars until the whole sum was collected, without notice from the plaintiff before bringing a suit for it; and that C, in this action, was not liable for rent which he had not actually received. *Ibid.*

5. A note, and a mortgage deed given to secure it, were handed with other effects, by A, the administrator of the mortgagee, to B, the guardian of the mortgagee's heirs, on a settlement, as their property, but the note was not indorsed, and no assignment in writing was made of the mortgage, but a power of attorney was given to B to act in the name of A. This power was not recorded. It was *held*, that the mortgager or his assigns, if acquainted with the equitable assignment, had no right to tender or pay the mortgage money to A, if such tender or payment was made with a design to injure B and the heirs; and that a discharge of the mortgage made by A would not defeat the rights of B. *Cutler* v. *Haven.* 490

6 *It seems* that the payment should be made to B, and that he might discharge the mortgage by cancelling the deed and giving up the note *Ibid.*

7 Two parcels of land, in which S is entitled to dower, are mortgaged together as security for a debt. Afterward the mortgager conveys all his interest in one parcel to A. H. and in consideration of S's joining in the conveyance and releasing her right of dower, he conveys to her an estate for her life in the other parcel, upon which parcel she enters and takes the profits. The plaintiff purchases the mortgager's right to redeem this second parcel. P. H. having purchased A. H.'s interest in the first parcel, takes an assignment of the mortgage, and enters upon the mortgaged premises for foreclosure. On a bill in equity by the plaintiff to redeem, it was *held*, that S was not liable to contribute towards the redemption, nor to account for the profits of the second parcel, the lease for life having been made to her as an equivalent to her right of dower in both parcels. *Brooks* v. *Harwood.* 497

8. *Held*, also, that as the assignee of the mortgage could not have compelled S to pay over the rents and profits of the second parcel, without subjecting himself to her claim of dower in the whole land, he was not bound to account for them in this suit; and that the plaintiff had no equitable claim to them, as he purchased after the lease for life, and consequently at a reduced price on that account. *Ibid.*

9. *Held*, also, that the assignee of the mortgage was bound to account for the rents and profits of the first parcel, from the time of his entry for foreclosure. *Ibid.*

10. *Held*, also, that the plaintiff, upon paying the whole mortgage debt, deducting the rents and profits last mentioned, would be entitled to hold the whole estate mortgaged, excepting the part leased to S during her life, until he should be reimbursed the amount paid by him over his proportion of the mortgage debt. *Ibid*

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11. A and B, tenants in common, mortgage their land to C, to secure the payment of a joint and several bond, and A afterwards mortgages his moiety to C to secure a debt due from himself alone. C enters upon A's moiety of the land for breach of the condition of the second mortgage. He then brings an action against B upon the first mortgage for breach of the condition. *Held*, that the conditional judgment should be rendered for only one half of the amount of the bond. *Sargent* v. *M'Farland.* 500

12. Where a mortgage is given to secure payment of a note, and the assignee of the mortgage takes a new note from the mortgager, in exchange for the old one, it not being intended as payment, the mortgage debt is not thereby paid, but the mortgage remains good as security for the amount due on the new note, as against the mortgager himself. *Watkins* v. *Hill.* 522

13. Whether the exchange would operate as payment of the first note, as against a purchaser under the mortgager, *quære.* *Ibid.*

See ATTACHMENT, 4.
CONDITION.
COVENANT, 4.
EVIDENCE, 8, 9, 10.
MESNE PROFITS, 2, 3, 4.
TRESPASS, 2, 3.

NEW TRIAL.

1. A verdict will not be set aside as against evidence where there is evidence on both sides, unless it is manifest that the jury in giving their verdict must have mistaken or abused their trust. *Baker* v. *Briggs.* 122

2. In an action on the case, for falsely representing H to be "worthy of credit," knowing he was not, the defendant pleaded the general issue. The jury retired on Saturday afternoon and separated in about three hours, the judge having authorized them so to do, when they should have made up their verdict; and, on the following Monday morning, they rendered in a verdict, "that the defendant did not say H was perfectly good, knowing it to be false and with intention to defraud." The judge informed them what the issue was, directing them to retire again; which they did, and returned with a similar verdict, adding thereto, "and they thereupon find the defendant not guilty." *Held*, that the first verdict was defective in form only, and therefore that the separation of the jury and the return of the second verdict were not grounds for a new trial. *Winslow* v. *Draper.* 170

NOTICE.

1. A purchaser of land without notice of an incumbrance, may convey the same free of the incumbrance to a purchaser who has notice. *Boynton* v. *Rees.* 329

2. Where notice of a petition for a review, was served on the attorney of record of the nominal party, the party in interest being present when such notice was ordered, the Court, in their discretion, held the notice to be sufficient; no particular mode of notice being prescribed by the statutes respecting reviews. *Ferrill* v. *Simpson.* 359

See ASSUMPSIT.
BILL OF EXCHANGE, &c. 2, 6, 7, 9, 17.
CONTRACT, 10.
CONVEYANCE, 4.
GUARANTY, 3.
POOR, 1, 4.
WAY, 4, 6.

OFFICER.

If an officer would take goods belonging to A and in A's possession, upon a writ against B, A may maintain his possession by force, in the

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same manner as he might against any trespasser who is not an officer. *Commonwealth* v. *Kennard.* 133

OUSTER.

See TRESPASS, 1.

PARISH.

1 On an application for a *mandamus* to compel the clerk of a parish to give the petitioner a certificate of his having become a member of the parish, in order that he might file it with the clerk of the religious society which he wished to leave, the *mandamus* was refused, on the ground that the petitioner had a remedy by action, and a decision on this summary process might affect the rights of persons who had not been heard. *Oakes* v. *Hill.* 47

2. Where a second parish is formed in a town which has conducted its parochial affairs without organizing itself as a parish, the affairs of the first parish may lawfully continue to be managed by the town. *Ashby* v. *Wellington.* 524

3. So that where a collector of the town gave a bond, with sureties, conditioned to pay over to the town treasurer all moneys assessed by the town and committed to him to collect, the obligors were held liable for the amount received by the collector on account of a tax assessed by the assessors of the town for the payment of the minister of the first parish. *Ibid.*

See TAX, 5.

PARTITION.

The respondent in a petition for partition cannot avail himself of *St.* 1807, *c.* 75, (the *betterment act,*) which allows the tenant, in certain cases, the benefit of improvements made by him upon the land. *Liscomb* v. *Root.* 376

PARTNER.

See CHANCERY, 1.
INSURANCE COMPANY, 1.
RELEASE, 1, 2.

PAYMENT.

See BILL OF EXCHANGE, &c. 18.
MORTGAGE, 12, 13.

PERSONAL PROPERTY

1. A building erected by an individual on land belonging to the government, he having no right in the soil, is, as between individuals, personal property. *Marcy* v. *Darling.* 283

2. So *held* in the case of a bathing-house erected on piles driven into the bed of a navigable river below low-water mark. *Ibid.*

See ATTACHMENT, 5.

PILOT.

1. A pilot, while he has charge of a vessel, is the agent of the owner. *Yates* v. *Brown.* 23

2. The owner of a vessel which, through the fault or negligence of any one on board, injures another vessel by running foul of her, is liable to the injured party, although there be a pilot on board who has the entire control and management of the vessel. *Ibid.*

PLEADING.

1. In a writ of entry, a plea that in a former writ of entry the tenant recovered judgment for costs, without stating that such judgment was upon the merits, is insufficient. *Wade* v. *Howard.* 355

2. Repugnancy between a protestation and an averment in a replication, is not a ground of demurrer *Hapgood* v. *Houghton.* 451

3. In assumpsit against an executor, the defendant pleads that the testatrix devised land to the plaintiff in lieu and satisfaction of his demand, and that the plaintiff accepted the

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devise; the plaintiff, protesting that the testatrix did not make the devise in lieu, &c. and that the will was not proved, replies that he did not accept the land devised, concluding to the country. *Held*, that the replication was good. *Ibid.*

4. The executor pleads, that the plaintiff was requested to make his election to take or refuse the devise, but that he refused to elect; the plaintiff replies that he did refuse to accept the devise, traversing the allegation that he refused to elect; the executor rejoins that the devise has not been waived by the plaintiff, concluding with a verification. *Held*, that the rejoinder is bad, as being a departure, and because it does not join the issue tendered by the traverse. *Ibid.*

5. The executor pleads that the plaintiff did not waive or refuse the devise; the plaintiff, protesting as before, replies that he did waive and refuse to accept *any* devise contained in the will; concluding to the country. *Held*, that the replication was good. *Ibid.*

See CHANCERY, 2.
DOWER, 1.
EVIDENCE, 2.
EXECUTOR, &c. 2, 3, 4, 5.
RELEASE, 2, 5.
VARIANCE, 4.
WASTE, 4, 5, 6.

POOR.

1. A notice by overseers of the poor that expenses had been incurred for the support of "*the child* of Miss H. W., the daughter of T. W., who are *inhabitants* of the town of W.," was *held* sufficient to sustain assumpsit against such town. *Ware* v. *Williamstown.* 388

2. Whether a town can at any time set up their own illegal proceedings, or those of their officers in the assessment of a tax, after the tax has been paid, to defeat a settlement gained thereby, *quære*. But where so long a time had elapsed since the payment of the tax, that no claim for reimbursement could be sustained, it was held that they could not *Charlemont* v. *Conway* 408

3. Where the assessors assessed more than five per cent over and above the sum committed to them to assess, it was *held*, that the tax was not duly assessed within the meaning of *St.* 1793, c. 34, relative to gaining a settlement. *Ibid.*

4. In an action by one town against another, to recover expenses incurred in the support of a pauper, a notice signed by A and B as selectmen, they being overseers of the poor by virtue of their office of selectmen, was held sufficient. *Ashby* v. *Lunenburg.* 563

See EVIDENCE, 19 20
TAX, 2.

POSSESSION.

See TENANTS IN COMMON.

PRACTICE.

1. The deposition of a witness was rejected at the trial, on the ground of interest, and the plaintiff nonsuited, and the judge who tried the case refused to take off the nonsuit in order to give the plaintiff an opportunity to execute a release to the witness, and have his deposition taken anew. It was *held*, that this was a proper matter for the discretion of the judge, and that his refusal was right. *Talbot* v. *Clark.* 51

2. *It seems*, that the plaintiff had no sufficient ground for the postponement of the trial or continuance of the action, even if his motion had been made before the nonsuit was ordered. *Ibid.*

3. It is not necessary to object to the competency of a witness on the ground of interest, at the time when his deposition is taken; it is sufficient to make the objection at the trial. *Ibid.*

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1. This Court refused to give an opinion, on a bill in equity, whether the facts stated were a defence to a suit at law, which was pending in the Common Pleas, although the parties had agreed to submit the question to this Court, and to be bound by the decision. *Stone* v. *Hobart.* 464

See EVIDENCE, 7, 14, 15, 21, 23.
EXCEPTIONS.
NOTICE, 2.

PRESCRIPTION.

1. The time of legal memory or prescription in this Commonwealth, does not extend further back than sixty years. *Coolidge* v. *Learned.* 504
2. Whether it extends further back than forty years, *quære.* *Ibid.*
3. In trespass *qua. cl. fr.*, a plea that the *locus in quo* has been from time immemorial a public landing-place, in which every citizen has had from time immemorial a right of entering, was held good. *Ibid.*
4. In trespass *qua. cl. fr*, where the *locus in quo* had for a long time been claimed by the inhabitants of the town where it was situated, as a town landing-place, but not for their exclusive use, evidence of a long continued use of it by the public at large without any objection on the part of the town, was held sufficient to support a verdict finding it to be a public landing-place. *Ibid.*

PRINCIPAL AND AGENT.

1. A written authority is not necessary in order to enable an agent to sign for his principal, a contract required by the statute of frauds to be in writing. *Shaw* v. *Nudd* 9
2. W, as agent for S, agreed with N, at Newburyport, to purchase of him a quantity of fish then at Newburyport, and N told W to go to C the next day and get him to sign the contract for N, if he was not in town himself. W accordingly wrote a contract, stating a sale of the fish by N to S for "12*s.* 3*d.* per quintal and nine cents per quintal for delivering them in Boston, the wharfage to be paid by S, all other incidental charges to be paid by N, cash to be paid in Boston, the fish to be at S's risk when on board the vessel at Newburyport." C signed this contract for N, and received from W a counterpart, signed by W in behalf of S. C had no authority to act for N, except that communicated by W. C delivered the counterpart to N the same day, who received it without objection, and did not object to it for several days. N having refused to deliver the fish, S brought an action on the written contract to recover damages for the non-delivery; *Held*, —

That N was bound by the contract, even if C had no authority to sign it, having adopted it. *Ibid.*
3. Also that by the contract the fish were to be delivered in Boston, and would not become the property of S until delivered there. *Ibid*
4. Also, that therefore the damages recoverable must depend on the value of the fish at Boston, at the time when they ought to have been delivered. *Ibid.*
5. A remitted from the United States to W, his general agent in London, certificates of shares in the United States Bank which stood in A's name, and the usual blank powers of attorney to transfer them. W sold the stock to C, and at the bottom of the bill of parcels delivered C, signed an agreement, by which, in consideration of the purchase money, he guarantied the regularity of the documents, and promised "to be accountable for such dividends as may become due and be received by me or my agent from the first day of January, 1825, until transfer, provided such transfer be made within twelve months from this date." After this sale, on

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May 18, 1825, W wrote to A, requesting him, if the stock was not transferred by July 1st, to receive the July dividend, adding, "which I must pay to the purchaser." A accordingly received the July dividend, and by the next packet remitted to W funds to a much larger amount than the dividend, intending them for the payment of the dividend and other mercantile uses, though nothing was specified as to the mode of appropriating the funds. This remittance made W indebted to A, and he continued to be so until he became bankrupt in October, 1825, never having paid the dividend to C. C, in May, 1826, demanded this dividend of A, who had never before known who purchased the stock. In an action brought by C against A for money had and received to recover the amount of this dividend, it was *held*, that A was originally accountable to C for the dividend; but that the words of the contract made W the agent of C to receive the dividend, and consequently that the remittance to W exonerated A from any claim by C; and that as the remittance brought W into A's debt, it was not necessary to specify the object of the remittance in order to produce this effect. *Cropper* v. *Adams*. 40

6. The rule, that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds and not to simple contracts. *New England Mar. Ins. Co.* v. *De Wolf*. 56

7. I. C., who was duly authorized by J. D. to guaranty two notes, wrote on one, "by authority from J. D. I hereby guaranty the payment of this note. I. C."; and on the other, "By authority from J. D. in a letter dated September 24, 1824, [from which C derived his authority] I hereby guaranty his payment of the premium on policy No. 10,079 [for which the note was given]. I. C." *Held*, that J. D was bound as guarantee of the notes, and not I. C. *Ibid*

8. The letters from J. D. to I. C. and from I. C. to J. D. and from J. D to the person whose notes were guarantied, and from him to J. D. and to I. C., written before and soon after the guaranties were made, and in relation thereto and to the transactions in which they originated, being part of the *res gestæ*, are admissible evidence in an action against J. D. as guarantee of the notes. *Ibid.*

9. If goods consigned to a commission merchant for sale, and on which he has a lien for a balance due to him from the owner, are attached as the property of the factor, the owner of the goods may maintain trespass against the officer who made the attachment *Holly* v. *Huggeford*. 73

10. The lien of the factor is a personal privilege, and cannot be set up by any other person in defence of an action by the principal. *Ibid.*

11. A commission merchant, who had sold an article consigned to him afterwards purchased it back at a reduced price on his own account, but it proving defective, the original owner who had made the consignment agreed to take it back, and it was accordingly charged to him in account by the factor, though it still remained in the factor's possession, without any other act to revest the property. *Held*, that the property was revested in the original owner, who might maintain trespass against any wrong-doer who took the article from the possession of the factor. *Ibid.*

See ASSIGNMENT, 6.
GUARANTY, 1.
PILOT, 1, 2.

PRINCIPAL AND SURETY.

1. A creditor who has his debt secured by a surety, and has also proper

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ty pledged to him by the principal debtor as security, is bound to keep the property for the benefit of the surety as well as himself, and if he surrenders the property without the knowledge and consent of the surety, he loses his claim against the surety to the amount of the property given up. *Baker* v. *Briggs*. 122

2 A surety, who is sued alone, is entitled in this State to the same defence in law which he would have in equity. *Ibid.*

3. Whether the surety can set up such equitable defence when he and his principal are sued in a joint action, *quære*. *Ibid.*

4. If the creditor informs the surety that his debt is paid, and the surety thereby loses an opportunity of securing himself against his principal, the surety is discharged, although the debt was not in fact paid, and the creditor acted under a mistake in the declaration which he made. *Ibid.*

5 Where the creditor received from the principal debtor the note of a third person to a larger amount than the debt, and gave a receipt which stated that the note was received "in security for all notes signed" by the debtor, it was *held*, in an action against the surety, that parol evidence might be received to show that the note of the third person was received in payment by the creditor, and with intent to discharge the debtor and his surety. *Ibid.*

6 Where a promissory note was signed by B and H as principals, and by the defendant as surety, it was *held*, that the reception of interest in advance, of the principals, by the holders, after the note was overdue, did not discharge the surety. *Oxford Bank* v. *Lewis*. 458

See BILL OF EXCHANGE, &c. 12.
CHANCERY, 12.

PROBATE BOND.

The consent of the judge of probate, that a suit may be brought upon a probate bond, is sufficient, without any decree; but where he refuses to deliver over a bond to be sued, *it seems* a decree is necessary, in order that the party aggrieved may have an opportunity to appeal. *Jones, Appellant, &c.* 121

See SET-OFF, 1, 2.

RELEASE.

1. Where one partner signs a general release to a debtor of the firm, and it does not appear whether it is intended to apply to separate or to partnership demands, or that the subscribing partner has, on his separate account, any demand against the debtor, the release will be a discharge from debts due to the partnership. *Emerson* v. *Knower*. 63

2. If, in an action by the partners for their joint demand, such release is pleaded, and they propose to show that it was intended to apply only to the separate demand of the subscribing partner, they should reply, alleging this fact. *Ibid.*

3. Where auctioneers sold goods of the plaintiff to the defendant, and took in payment a note made by the defendant payable to his own order and indorsed by him, and he afterwards stopped payment, and the auctioneers became parties to an indenture of assignment for the benefit of his creditors, containing a release, and a sum was put down against their names as the amount of their demands, which was just sufficient to include all their other demands, and also this note, which still remained in their hands, though at the time of signing the indenture they said they did not know whether they had guarantied this sale or not; and it appeared on examination afterward that they

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had not, and they accordingly did not claim under the assignment for the amount of this note; and the plaintiff, being requested to become a party to the indenture, declined, saying that he was not a creditor of the defendant; — it was *held*, that the auctioneers, by thus becoming parties to the indenture, had not released the note in question. *Nichols* v. *Arnold.* 172

4. *Held*, also, that the plaintiff's declaration, made on the supposition that the sale was guarantied, that he was not a creditor of the defendant, was not an estoppel *in pais* whereby he was precluded from demanding of the defendant payment of the note. *Ibid.*

5. A surrejoinder denying that the auctioneers had authority to release the defendant, *absque hoc* that they did release him, is bad for duplicity, each fact being material and a sufficient issue. *Ibid.*

See ASSIGNMENT, 1.

RESERVATION.

See LEASE.

REVIEW.

See NOTICE, 2.

RELIGIOUS SOCIETY.

See PARISH, 1.

REAL ESTATE.

See ATTACHMENT, 5.
PERSONAL PROPERTY, 1, 2.

SALE.

1. Where one purchases goods upon an examination of a specimen taken by him out of a small aperture in the case, in which the article is contained, this is a sale by sample. *Williams* v. *Spafford.* 250

2. Where an article was purchased in that manner, as a seroon of indigo, but the greater part of the contents of the seroon proved to be a different substance, and the remainder to be indigo of a quality inferior to the specimen, it was *held*, that the seller was liable to the purchaser in assumpsit on a warranty, that the article sold was indigo of the same quality as the sample. *Ibid.*

3. In the case of a sale of chattels *bonâ fide* and for a valuable consideration, slight evidence of a delivery is sufficient; and if the vendee, with the consent of the vendor, obtains possession before any attachment or second sale, the transfer is complete, without a formal delivery *Shumway* v. *Rutter.* 443

4. Thus where furniture in a tavern was sold and the vendee took a lease of the house and went to live there and used the furniture in common with the vendor, who had occupied the house under a previous lease, and who continued to live there and keep the tavern, and afterwards the vendor removed to another house, carrying the furniture with him and using it as his own, and it was there attached as his property, it was *held*, that there was sufficient evidence of a delivery to make the sale complete. *Ibid.*

5. The plaintiff contracted to make some pew pannels for J, who was building a meetinghouse, to be paid for in cash on the delivery of the pannels. The plaintiff made the pannels and brought them to the meetinghouse, and deposited them there, but J was not there, being absent from town, but only some of his workmen. *Held*, that the pannels were not delivered, but still remained the property of the plaintiff and were not liable to attachment as the property of J *Woodbury* v. *Long.* 543

See EVIDENCE, 22.
SHIP, 1, 3.

SEISIN AND DISSEISIN

See MORTGAGE 1 2

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SELECTMEN.

See SPENDTHRIFT, 1, 2.

SEPULCHRE.

See INDICTMENT, 1.
STATUTE, 2.

SERVICE.

See WRIT, SERVICE OF.

SET-OFF.

1. A judgment in favor of the judge of probate in a suit upon a probate bond, brought in his name, for the benefit of a legatee, against an executor and his sureties, may be set off against the judgment recovered by the executor in his individual capacity against the legatee. *Barrell* v. *Barrell.* 342
2. The Court, in their discretion, refused to set off the costs in such action. *Ibid.*

SETTLEMENT.

1. A voluntary settlement fairly made and without a power of revocation reserved in the deed of settlement, cannot be set aside upon the application of the settler. *Hildreth* v. *Eliot.* 293
2. A feme sole, about to be married, conveys real and personal estate to her father, his heirs and assigns, to be held in trust by him, and by any other trustee to be appointed by the judge of probate, for her separate use, without being liable to the debts or control of any husband she may have during the trust; the income to be paid her during her life, and the residue and remainder to be conveyed to such child or children, his or their heirs and assigns, as she shall leave. She marries, and her husband dying, she takes a second husband, by whom she has issue living. Her father dies leaving several children. The judge of probate refuses to appoint a new trustee. Upon a bill in equity by the husband and wife to set aside the settlement, it was *held*, that the trust estate did not merge in the legal, the equitable estate being only for her life, and she having the legal estate in a portion only of the property as tenant in common with the other children of the trustee: and it was decreed that a new trustee should be appointed. *Ibid.*

SHERIFF.

See AMENDMENT, 2.

SHIP.

1. A bill of sale is not necessary to transfer property in a ship. *Bixby* v. *Franklin Ins. Co.* 86
2. The bill of sale and customhouse register or enrolment, are not conclusive evidence of property in a ship. *Ibid.*
3. In assumpsit, to recover one quarter of the proceeds of the sale of a vessel and of her earnings previously to the sale, the plaintiff, in support of his title, produced a bill of sale of one quarter thereof from S, who with three others was the first owner of the vessel. The defendant produced a paper, executed previously to the sale to the plaintiff, by all the first owners, whereby they agreed to "pledge" to the defendant the vessel, then building, as security for his advances thereon, and to allow the defendant to buy any part of the vessel, at a certain rate per ton. The vessel was afterward sold by the defendant; but his advances amounted to more than the proceeds of the sale and earnings. *Held*, that the last mentioned instrument was not an absolute transfer, nor a mortgage, nor a pledge; and that without a delivery of the vessel it was incompetent to avoid the subsequent transfer to the plaintiff. *Bonsey* v. *Amee.* 236

See BILL OF LADING.
INSURANCE, 10, 11.
PILOT, 1, 2.

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SHIP, MASTER OF.

See ASSUMPSIT.

SLANDER.

1. An action of slander lies for charging an unmarried female with having committed fornication. *Miller* v *Parish*. 384
2. A declaration in slander, after averring a colloquium concerning the plaintiff and A, charges the defendant with saying, that A thinks it a hard matter to commit fornication with "his niece (meaning the plaintiff.)" This was *held* sufficient, without any averment that the plaintiff was A's niece. *Ibid.*

SPENDTHRIFT.

1. The selectmen of a town being appointed guardians of a spendthrift, under the statute authorizing the judge of probate to appoint the selectmen or "other suitable persons," do not cease to be such guardians on the expiration of the period for which they were elected to the office of selectmen. *Russell* v. *Coffin*. 143
2. It is not requisite that such guardians should give a bond with *sureties*, as a condition precedent to their acting; it being in the power of the judge of probate to remove them at any time, on their failing to give security as he may direct. *Ibid.*

STATE INSOLVENT LAW.

See INSOLVENT LAW.

STATUTE.

1. Penal statutes, though they are to be construed strictly, are yet to receive such a construction as will conform to the manifest intention of the legislature and avoid an absurdity. *Commonwealth* v. *Loring*. 370
2. Thus in an indictment upon *St.* 1814, *c.* 175, forbidding any person to dig up a human body, "not being authorized by the selectmen of *any* town in this Commonwealth," it was *held* sufficient to aver, that the defendant was not authorized by the selectmen of the town where the body had been buried; this being according to the intention of the legislature. *Ibid*

STATUTES CITED AND EXPOUNDED.

ENGLISH STATUTES.

52 *Hen.* 3. (*Marlbridge.*)	Waste	309
6 *Edw.* 1, *c.* 5. (*Gloucester.*)	Waste	309
13 ———, *c.* 39. (*Westm.*)	Limitations	504
32 *Hen.* 8, *c.* 2.	Limitations	504
21 *Jac.* 1, *c.* 12.	Costs	320

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13 *Will.* 3, *c.* 9.	Waste	309

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—— *c.* 55.	Usury	512
1784, *c.* 28.	Costs	25
—— *c.* 40.	Marriage	433
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—— *c.* 28.	Trespasses	453
—— *c.* 62.	Waste	309
—— *c.* 66.	Fornication	384
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—— *c.* 69.	Marriage	437
1786, *c.* 5.	Administrator	29
—— *c.* 10.	Parish	494
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—— *c.* 66.	Administrator	395
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1792, *c.* 32.	Witness	518
1793, *c.* 34.	Poor	380, 408
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1797, c. 50. Service of writ 163
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—— c. 148. Trustee process 25, 67, 470
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1821, c. 110. Boston 218
1822, c. 27. Blackstone canal 473
1823, c. 106. Religious society 494
—— c. 142. Creditors 165
1824, c. 119. Jury 504
1825, c. 104. Militia 431
—— c. 171. Highway 345

STOCK, TRANSFER OF.

See CORPORATION, 3.
INSURANCE COMPANY, 1, 2, 3, 6.

STOPPAGE IN TRANSITU.

1. Goods shipped on board a vessel, are still *in transitu* after the arrival of the vessel in which they are shipped, until they are taken possession of on behalf of the consignee. *Naylor* v. *Dennie.* 198
2. An attachment of goods on board a vessel, as the property of the consignee, does not defeat the right of the consignor to stop them *in transitu.* *Ibid.*
3. Though the right of stoppage *in transitu* on the part of the consignor is adverse to that of the consignee, yet the consignor's right of stoppage is not defeated by his obtaining from the consignee a writing, in which the consignee declares that he revokes the order for the consignment, declines to receive the goods, and requests the master of the ship, or any other person having the goods in his custody, to deliver them to the consignor. *Ibid.*

SURETY.

See PRINCIPAL AND SURETY.

TAX.

1. The assessment of half a poll tax upon an individual, *it seems*, is illegal. *Southampton* v. *Easthampton.* 380
2. Where a town voted in March to raise a sum of money for highways, and in April the selectmen, being also assessors, handed to each surveyor of highways a paper directing him to repair certain highways and apportioning a certain sum upon individuals within his district, according to the valuation of the preceding year, and stating the rates at which labor upon the highway should be estimated, and individuals worked upon the highways without reference to the sums against their names respectively, the surveyor keeping an account of the work performed, it was *held*, that this was not a legal assessment of a highway tax; so that labor performed by an individual to the amount of the sum set against his name, would have no effect towards giving him a settlement. *Ibid.*
3. Where no return had been made to the clerk of the District Court, of a sale of land for the United States direct tax of 1815, to enable him to give a deed to the purchaser, it was *held*, that in order to maintain an action by the purchaser against the collector for not causing such a return to be made, by means of which neglect the plaintiff lost the title and possession of the land, it was necessary for the plaintiff to prove that the tax was granted by congress, that it was duly assessed, and that all the proceedings neces-

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sary to give validity to the sale, except those which it was the duty of the defendant to perform, were legally had, so that it should appear that the plaintiff's losing the land was owing to the defendant's neglect. *Holden* v. *Eaton* 436

4. Proof that the defendant was collector, and that the person who made the sale was his deputy, and that the defendant had received from another person who acted as principal assessor, a list of the taxes in his district, will not throw on the defendant the burden of proving that the tax was not legally assessed. *Ibid.*

5. The personal property of a minor, who attends public worship in a different parish from his guardian, is nevertheless to be taxed to the guardian in the parish of which he is a member. *Baldwin* v. *First Parish in Fitchburg.* 494

See POOR, 2, 3.

TENANTS IN COMMON.

Where one in possession under a tenant in dower held over after her death and purchased the shares of some of the reversioners and continued in the exclusive possession, but without manifesting an intention to oust the other reversioners, it was *held*, that his possession was according to the title, and these reversioners might maintain a petition for partition. *Liscomb* v. *Root.* 376

See DEVISE, 2.

TOWN.

See PARISH.
POOR.
WITNESS.

TRANSFER OF STOCK.

See CORPORATION, 3.
INSURANCE COMPANY, 1, 2, 3, 6.

TRESPASS.

1. A constructive ouster by an heir claiming the whole estate under a supposed devise, will not sustain an action of trespass brought against him by the co-heir. *Allen* v. *Carter.* 175

2. A mortgagee of personal property mortgaged to secure a debt, may maintain trespass against a stranger, who takes it from the possession of the mortgager, although the trespass be committed before the debt becomes due. *Woodruff* v. *Halsey.* 333

3. A mortgagee of a building standing, not on land of the mortgager, but on that of a third person, may maintain trespass against a stranger who pulls down and carries away the building, the building being unoccupied at the time of the trespass, and the mortgagee not having taken actual possession. *Ibid.*

4. Trespass may be maintained against a person who carries away the materials of a building, which has been pulled down by a trespasser, though the person carrying them away was not engaged in the pulling down. *Ibid.*

5. The plaintiffs being owners of a close and a mill thereon, on the north side of a river, and their milldam being rightfully extended to land on the other side, which they did not own, the defendants crossed the river below the plaintiffs' land and destroyed a part of the dam on the south side, and having effected their object, they recrossed the river at the same place and went upon the plaintiffs' close. It was *held*, that the destruction of the dam and the entry upon the close were distinct trespasses, so that a judgment in trespass *quare cl. fr.* for the latter would not be a bar to a like action for the former. *White* v. *Moseley.* 356

6. *Held*, also, that in trespass *quare cl. fr.* for the destruction of the dam, the plaintiffs were entitled to recover consequential damages for the interruption of the use of their

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mill, this injury being set forth in the declaration. *Ibid.*

See ACTION ON THE CASE.
ATTACHMENT, 6, 7.
OFFICER.

TROVER.

1. A tortious taking is, in an action of trover, proof of conversion. *Woodbury* v. *Long*. 543
2. If the goods of the plaintiff are attached as the property of J, the plaintiff may maintain trover against the attaching officer, without proving any demand, even where the goods are so situated as that the officer might have fairly supposed them to be the property of J. *Ibid.*

TRUST.

See CHANCERY, 5, 6, 7, 8, 9, 10, 11.
SETTLEMENT, 2.

TRUSTEE PROCESS.

1. In a trustee process, no evidence can be admitted to charge the trustee, except what he discloses in his answers. *Hawes* v. *Langton & Tr.* 67
2 In such a process the trustee is not obliged to disclose communications made to him by other persons, though it seems he may disclose them in his answers, if he is satisfied of their truth. *Ibid.*
3 Where a person, summoned as trustee, disclosed an assignment to himself by the defendant, of property for the benefit of creditors, apparently valid ; and the defendant made an affidavit of facts tending to show the assignment fraudulent, and the trustee refused to annex the affidavit to his answers, expressing his disbelief of the facts stated in the affidavit, the court refused to order the trustee to annex the affidavit to his answers. *Ibid.*
4. *It seems*, that where a debtor is summoned as trustee of his creditor, the court cannot compel him to disclose an assignment of the debt to a third person, where the trustee does not personally know the fact of the assignment. *Ibid.*
5. If the assignee should be injured by the trustee's refusing to state the assignment in his answers, *it seems*, that he would have a remedy by an action against the trustee. *Ibid.*
6. Where an assignee of the defendant's property for the benefit of creditors is summoned as trustee, the plaintiff is not, under *St.* 1817, *c.* 148, entitled to a trial by jury to try the validity of the assignment. *Ibid.*
7. One summoned and charged as trustee is not entitled to retain a part of the fund in his hands, for the payment of fees of his counsel. *Adams* v. *Cordis*. 260
8. Where property in the hands of the trustee is claimed by an assignee of the principal defendant, the trustee is not obliged to disclose the assignment and contest the right of the attaching creditor, without an offer of indemnity against the expenses of the suit. *Semble*. *Ibid.*
9. H having in his hands goods of N for sale, on which H had made advances, N requested him to pay out of the proceeds of the goods a bill drawn by N which had been dishonored, and to inform S & Co., who had accepted the bill for the honor of an indorser, of this request. H accordingly informed S & Co. of this request, and promised them verbally to pay the amount of the bill as soon as he should be in funds from the proceeds of the property. H having been summoned in foreign attachment, as the trustee of N, it was *held*, that S & Co had acquired a claim against H for the funds in his hands, and that he was therefore chargeable as trustee of N, only for the balance in his hands after deducting his advances and the amount of the bill. *Curtis* v. *Norris & Tr.* 280
10. Choses in action assigned, are

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not, in the hands of the assignee, goods, effects or credits of the assignor, liable to the trustee process; even in case the assignee would be trustee after receiving money by means of the choses in action. *Lupton* v. *Cutler & Trs.* 298

11. A debtor assigned goods and choses in action to assignees, for the benefit of such of his creditors as should become parties to the assignment. After some of the creditors had become parties, the assignees were summoned as trustees of the debtor; and it appeared from their answers, that when the writ was served on them, the goods were not sufficient to pay those creditors, though the proceeds of the whole funds, including the choses in action, would be more than sufficient. The Court refused to direct the trustees to pay the creditors who had signed, out of the proceeds of the choses in action in the first place, and thus leave a part of the goods to be held by the trustee process, and discharged the trustees. *Ibid.*

12. A made an absolute deed of land to R, which was intended as a security for money to be advanced by R to and on account of A, and R, about a year after, gave A a bond to reconvey the land on payment of the money advanced in the mean time; R afterwards sold the land on a credit for an amount more than enough to pay all that was due to him from A; a part of the purchase money was secured by a mortgage of the land from the purchaser to R. R was afterwards summoned as trustee of A. At the time of the service, the amount secured by mortgage had not been paid, and the remainder of the price for which R sold, and which had been paid, did not amount to so much as was due from A to R. *Held*, that R was chargeable as trustee of A, for the difference between the price for which R sold the land, and the amount due to him from A. *Richards* v. *Allen & Tr.* 405

13. Where a debt has been assigned by the creditor, and the debtor is afterward summoned as his trustee, in order to entitle the assignee to the benefit of his assignment, it is not necessary that he should give notice of it to the debtor before the service of the trustee writ on him; it is sufficient if the notice is given at any time before he has made his answer. *Ammidown* v. *Wheelock & Tr.* 470

14. Where such an assignment is disclosed in the answer, and the assignee desires to become a party to the suit under St. 1817, *c.* 148, and the Court of Common Pleas refuses to let him become a party, he may bring the question before this Court by a bill of exceptions, and upon a reversal of the decision below, may have a jury trial before this Court. *Ibid.*

15. In order to entitle the assignee to become a party under the statute, it is not necessary that he should offer to the person summoned as trustee, any evidence of the assignment, beyond his own statement; it is sufficient if he gives the trustee, before his answer, notice of what appears to be a valid assignment. *Ibid.*

16. Where a note not negotiable is assigned, and the maker is subsequently summoned as trustee of the payee, in order to entitle the assignee to become a party to the suit, it is not necessary that he should exhibit the note to the trustee when he gives the trustee notice of the assignment. *Ibid*

17. Neither choses in action nor land assigned, are, in the hands of the assignee, goods, effects, or credits of the assignor liable to the trustee process; even in case the assignee would be trustee after receiving money by means of the choses in action, or as the proceeds of the sale of the land. *Gore* v. *Clisby & Tr.* 505

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18. A debtor assigned goods, choses in action and land, to an assignee, for the benefit of creditors. After some of the creditors had become parties to the assignment, the assignee was summoned as trustee of the debtor, before money was collected on any of the choses in action, or the land was sold. The goods were not sufficient to pay the debts of those creditors who had become parties before the writ was served, but the proceeds of the whole funds, including the choses in action and the land, would be more than sufficient. The Court refused to direct the trustee to pay the creditors who had signed, out of the proceeds of the choses in action and the land in the first place, and thus leave a part of the goods to be held by the trustee process, and discharged the trustee. *Ibid.*

See APPEAL, 1.
COSTS, 2, 3.
DAMAGES, 2.

TURNPIKE ROAD.

See VOLUNTARY PAYMENT.

USURY.

Where money was lent before the statute of usury, 1783, *c.* 55, was repealed, and a promissory note was given for its repayment with lawful interest, and the borrower promised verbally to pay a usurious rate of interest for the loan; it was *held*, that the note was not rendered void by the verbal agreement. *Butterfield* v. *Kidder*. 512

VARIANCE.

The plaintiff declared against the defendant for erecting a building on a strip of land, "which ought forever to remain open for the accommodation of the estates of the parties," and produced a deed of such strip, reserving to the parties the privilege of passing over it "for the sole purpose of repairing either of said estates;" and there was no averment that the plaintiff had been prevented from repairing his estate, nor any evidence that he intended to repair, or that he had given notice to the plaintiff of any such intention. *Held*, that the declaration was not supported by the evidence. *Hill* v. *Haskins*. 83

2. The plaintiff declared against the defendant for obstructing a triangular strip of land "which ought forever to remain open for the accommodation of the adjoining estates of the parties," but the evidence was of such an easement in a strip in the form of a parallelogram; whereupon leave to amend was granted. *Ibid.*

3. In an action for an injury sustained by the oversetting of the defendants' stagecoach, the plaintiff alleged, "that he paid for his passage in the coach from Albany to Boston, the sum of ten dollars, being the usual fare, and in consideration thereof the defendants undertook faithfully and carefully to transport him from Albany to Boston;" but the proof was merely, that the plaintiff rode in the coach a part of the route, namely, from Worcester to Boston, which is a part of several other lines of travel: — *Held*, that the evidence did not prove the contract set out in the declaration. *Harris* v. *Rayner*. 541

4. *Held*, also, that the averment of the consideration of the contract was material. *Ibid.*

5. *Held*, also, that the evidence would warrant the jury in presuming a transportation for hire. *Ibid.*

See LORD'S DAY, 2.

VERDICT.

A special verdict, intended to present the question of the construction of a devise, referred to the devise as being contained in the will of I. W., mentioning the date of the will and of the probate, but not stating the

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devise ; *held*, that the verdict was defective in substance. *Walker* v. *Dewing*. 520

See AMENDMENT, 3, 4, 5, 6.
EVIDENCE, 2.
NEW TRIAL, 1, 2.
WASTE, 5.

VOLUNTARY PAYMENT.

Where a writ of *certiorari* to the Court of Sessions had been granted upon the application of a turnpike corporation, because the court, without giving notice to the corporation, had issued a warrant for empannelling a jury to assess the damages sustained by an individual by the location of the turnpike road over his land, but pending the petition for the *certiorari* the corporation, in order that they might enter upon the land and make their road within the period allowed by their charter, paid the damages assessed by the jury, it was *held*, that the payment could not be considered to be voluntary, and that the writ of *certiorari* ought not to be quashed as having issued improvidently. *Commonwealth* v. *Hall*. 440

VOLUNTARY SETTLEMENT.

See SETTLEMENT.

WARRANTY.

See COVENANT, 3.
SALE, 2.

WASTE.

1. The statute of Gloucester, (6 *Ed.* 1, *c.* 5,) giving an action of waste against tenant for life, for the recovery of the place wasted and treble damages, has been adopted as a part of the law of this Commonwealth ; though in respect to tenant in dower, it has been modified by our own statutes. *Sackett* v. *Sackett*. 309

2. Two or more of several heirs having the reversion of land devised for life, may, by virtue of *St.* 1785, *c.* 62, § 3, bring an action of waste, without joining the others, a forfeiture of the land wasted being a consequence of sustaining the action against the tenant for life. *Ibid.*

3. An action of debt lies to recover the treble damages given by *St.* 1795, *c.* 75, § 3, for waste committed on land pending a suit for its recovery. *Reed* v. *Davis*. 414

4. The declaration in such an action, if the defendant was not a party to the suit for the land, must allege that he knew of the pendency of that suit when he committed the waste. *Ibid.*

5. The want of such an allegation is not cured by a verdict for the plaintiff, but is a good cause for arrest of judgment. *Ibid.*

6. A count in debt for cutting down and carrying away trees on land of which the plaintiff is lawful owner, and while he had a good and legal title thereto, without averring the pendency of any suit for the land, is bad. *Ibid.*

WAY.

1. The power vested in the mayor and aldermen of Boston as to laying out or altering streets "whenever in their opinion the safety or convenience of the inhabitants shall require it," is *judicial*, and a *certiorari* lies to remove their proceeding in such a case. *Parks* v. *City of Boston*. 218

2. Where such mayor and aldermen shall adjudge that the laying out or altering of a street is required by public safety and convenience, their having taken a bond from an individual to contribute towards the expense, will not vitiate their proceedings, provided the bond was not made the basis of their proceedings, and the adjudication was not colorably for the use of the city but really for the benefit of the individual. *Ibid.*

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3. Where one has a right of way over another's land, and the way is not defined, if the owner of the land stops up the way which is in use, the other party will be justified in going over another part of the land. *Farnum* v. *Platt.* 339

4. A notice of a meeting of the commissioners of highways for the purpose of viewing the route of a highway, signed "By order of the commissioners, A. B., chairman," was held to be sufficient, notwithstanding the objection that it did not appear that the notice was issued at a meeting of three or more of the commissioners. *Commonwealth* v. *Berkshire County Commissioners.* 343

5. Where, upon a petition for the alteration of a "county road" (as it was called, though in fact it was a town road) or the location of a new road, between two other county roads, the commissioners of highways laid out a new road between the termini, it was *held*, that their describing the new road as an alteration did not vitiate their proceedings. *Ibid.*

6. Where the commissioners, after notice to all persons interested, viewed the route for a highway, and adjourned to a certain time and place for the purpose of locating the way and assessing the damages to individuals, it was *held*, that it was not necessary to give notice of the time and place so appointed. *Ibid.*

7. A town which is obliged to maintain a highway, through which a canal has been constructed, not being the owner of the soil, is not entitled to damages under a statute providing for the assessment of damages to the owners of the land through which the canal passes *Millbury* v. *Blackstone Canal Company.* 473

See INDICTMENT, 2.
TAX, 2.
WITNESS.

WITNESS.

The right which the inhabitants of a town have in a way, common or other easement, is not a corporate right, and therefore an inhabitant cannot be admitted as a witness, by virtue of *St.* 1792, *c.* 32, to prove a way for all the inhabitants, by a non-existing grant or by prescription. *Odiorne* v. *Wade.* 518

See BILL OF EXCHANGE, &c. 8, 13
EVIDENCE, 4.
PRACTICE, 1, 3.

WRIT, INDORSEMENT OF

See COSTS, 1, 2.

WRIT, SERVICE OF.

The defendant in an action in the Common Pleas was described in the original writ as "late of Boston, &c. now of Lexington in Kentucky," and the writ was served by attaching his real estate and leaving a summons with his agent. *Held*, that this service was insufficient; such a service being lawful only where the defendant was at no time an inhabitant of the Commonwealth. *Peck* v. *Warren.* 163

END OF THE EIGHTH VOLUME.

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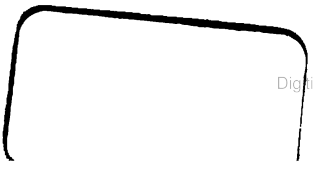

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